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No. .....

# In the Supreme Court of the United States

**October Term, 1980**

THOMAS LANCI,
*Petitioner,*

vs.

STATE OF OHIO,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI**
**To the Eighth District Court of Appeals**
**For Cuyahoga County, Ohio**

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## QUESTIONS PRESENTED

I. Whether an accused is unavoidably victimized by a prejudicial spill-over effect from the fact that at his trial for various substantive offenses, including aggravated murder and aggravated arson, he is also tried for the organized crime offense, which charge was predicated on an unconstitutional statute?

II. Was due process violated where proof of the crime for which an accused was acquitted was also an essential element of, and was necessary to sustain, a conviction of the crime for which he was convicted?

III. Whether the accused was denied due process, and otherwise substantially prejudiced, in the wake of any of the following circumstances that developed or occurred during his trial:

(A) The State argued in support of the admission of evidence showing other crimes, wrongs or "similar acts," that such evidence was properly admitted: (1) as evidence in furtherance of a "conspiracy", (2) as evidence of "similar acts," and (3) as evidence tending to prove the existence of a criminal syndicate and thus a violation of a statute later declared unconstitutional, where the trial judge fails to prevent by cautionary instructions the possible misuse of such evidence by the jury;

(B) There is admitted as substantive proof considerable evidence showing other crimes and wrongs, which evidence did not qualify for admission under the State's similar acts statute (*R.C. of Ohio*, §2945.59), the statute under which such evidence was tendered;

(C) Assuming the evidence referred to above qualified for admission under the above-indicated statute, the admission of such evidence as substantive proof of the charges made in the indictment cannot be justified in law, logic or common sense?

IV. Whether an accused is denied the effective assistance of counsel (A) when, as a result of his counsel's failure to request instructions limiting such evidence to the purposes enumerated in the relevant statute, considerable evidence was considered as substantive proof of the charges for which he was convicted; and (B) when, as a result of counsel's failure to request an instruction, evidence admitted solely on the basis of a charge for which the court acquitted the defendant is permitted to be considered by the jury as substantive proof of the charges.

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THOMAS LANCI,
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STATE OF OHIO,
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## PETITION FOR WRIT OF CERTIORARI
**To the Eighth District Court of Appeals**
**For Cuyahoga County, Ohio**

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner, Thomas Lanci, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on February 20, 1981; when the Supreme Court denied further appellate review.

## OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendices "A" and "B", *infra*, pp. A1 and A2 in the Appendix to this Petition.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C", p. A3.

## STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on February 20, 1981. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth as Appendix "D", p. A26.

## STATEMENT OF THE CASE [1]

The underlying factual situation in this appeal is set forth in considerable detail in the Opinion rendered by the Court of Appeals (see Appendix "C", pp. A3 to A25).

While there are serious flaws in some of the assertions, which the court treats as "facts" in drawing certain conclusions as to the occurrence of various events, there appears to be no real need, beyond the insertion of a few rudimentary "facts," to correctly structure for this Court the issues in this cause. So postured the facts and circumstances critical to this cause include the following:

*First*, that Danny Greene was, as the court concluded to be a fact, killed by "a dynamite bomb" that "was detonated by remote control" as he was about to enter his car (*id.*, pp. A3 to A25). This fact, which cannot possibly be disputed, established that Danny Greene was killed in the wake of an explosion.

*Second*, that considerable evidence was developed to show, if it did, that Ray Ferrito had been recruited by Licavoli and others to kill Danny Greene. *And*, according to the State's evidence, Louis Aratari, who in turn recruited Ronald

[1] Whenever reference is made in this petition to a page in the Record in the trial court, it will be preceded by the prefix "R". References to the Appendix to this petition, are noted as "Appendix___ p. ___."

Guiles, was himself recruited by Thomas Lanci to join in the conspiracy to kill Danny Greene *(id.,* at 23-24). Aratari's testimony on the salient facts in his evidence was disputed by considerable defense evidence -- not just that presented by this appellant.

*Third,* that after the lengthy presentation by the State, the trial court *denied* appellant Lanci's Motion for Judgment of Acquittal. This *fact* literally forced Lanci not only to present evidence as to the substantive offenses that were eventually submitted to the jury, but also with reference to Count III. This count charged him with being the member of a criminal "syndicate" – the Organized Crime Charge.

The Motion for Judgment of Acquittal at the close of the State's case certainly was responsible for Thomas Lanci testifying *and,* if it happened, being impeached on what even the Court of Appeals concedes were collateral points. (Also, the facts show the trial court had previously rejected Lanci's pretrial contention that the Organized Crime statute was indeed unconstitutional, a determination this Court was later to make in *State v. Young,* 62 Ohio St. 2d 370 [1980]).

*Fourth,* that considerable evidence was admitted *over objections as substantive proof,* and so considered by the jury, has been declared by the Court of Appeals to have been solely the fault of the various defense counsel who did not request the limiting instructions that Lanci was entitled to have given to the jury.

*Fifth,* that when the trial court ultimately granted the Motion for Judgment of Acquittal on the Organized Crime count at the close of all the evidence, this circumstance (if the appellate court's rationale can be credited) imposed a duty on defense counsel, *which was waived,* to urge the considerable evidence admitted *solely* as proof of the Organized Crime offense. (The specific contention has been made to the appellate court that these particular findings [as referred to in this and the previous enumeration] resulted, if their analysis is correct, in *the lack of effective assistance of counsel* – serious Sixth Amendment violations.)

*Sixth*, that according to the appellate court, absent any showing, doubtless by the defendant, that a miscarriage of justice occurred because the jury was not properly instructed in these critical areas, although due to the failures of defense counsel, *the claim of ineffective assistance of counsel can be rejected* by them on the basis of harmlessness.

*Seventh*, that also according to the Opinion below, there is no inconsistency, or redundancy, *and* there is simply nothing wrong with the fact that the jury found Lanci *not guilty* of Aggravated Arson (Count I) and *not guilty* of the aggravating circumstances – *i.e.*, Aggravated Arson, of the Aggravated Murder charge itself *and* a verdict finding Lanci guilty of "Aggravated Murder of Danny Greene *while committing or attempting to commit...Aggravated Arson.*" (Appendix "C", p. A3 [emphasis supplied]).

## ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The issues in this case involve several substantial constitutional questions. In addition, the case is one of great public and general interest. In this latter regard, as will be developed below in somewhat expanded detail, among other reasons for the considerable public and general interest in this case is the fact that this so-called "Mafia trial" had serious ethnic overtones. These were literally fanned by the media. Then there is the fact that the Federal government heavily contributed its energies both in resources and manpower, in the investigation and to the prosecution itself. Additionally, the considerable information furnished the media by the Government and the State has created the belief (whether founded or otherwise, yet shared by many) that regardless of the occurrences of any flaws in the actual trials, there is simply no way any of these convictions could ever be reversed in a State court. The argument being made is that no judge would risk being investigated by the Government, or abused by the media,[2] by reversing any of these convictions since to do so would entail possibly being critical of Federal agents, trial judges and, most assuredly, certain of the trial prosecutors.

While these rumors are surely unfounded, no one can deny that the media, both locally and nationally, influenced its constituents to believe these trials had something to do with the Mafia. Since this case was tried on an Organized Crime theory, based on a statute later declared unconstitutional in this Court,[3] the effect here has been that evidence admitted solely because of the Organized Crime charge unavoidably contributed to the ultimate guilty verdicts returned in this case.

For our part, as fully developed below, the evidence admitted because of the Organized Crime statute, and other "collateral" evidence not properly considered as substantive proof, was used by the court of appeals as a *"wild card"* in

2 See *e.g.*, the article entitled "The Animal and the Honorable," Cleveland Magazine, p. 14 (October, 1980).

3 *State v. Young*, 62 Ohio St. 2d 370 (1980).

its rush toward the judgment of affirmance being challenged in this case. The further fact that the appeals court would actually blame defense counsel for the advent of even some of these flaws makes Lanci's claim here that he received the ineffective assistance of counsel still another viable constitutional issue.

## I. An Accused Is Unavoidably Victimized By A Prejudicial Spill-Over Effect From The Fact That, At His Trial For Various Substantive Offenses, Including Aggravated Murder And Aggravated Arson, He Is Also Tried For The Organized Crime Offense -- A Charge Predicated On An Unconstitutional Statute.

(A)

Basically, what is being contended here is that Thomas Lanci was necessarily prejudiced by the fact that a considerable amount of the evidence admissible *solely* on the basis of the Organized Crime Count, which count was based on an unconstitutional statute (*State v. Young*, 62 Ohio St. 2d 370 [1980]), would have been inadmissible not only if he had been tried alone as contemplated by *R.C. of Ohio*, §2945.20,[4] but even if he had been tried jointly with his co-defendants on the Murder and Arson offenses uninfluenced by the fact that they were also being tried for Organized Crime. Even this is not all. Solely because of the presence of the Organized Crime Charge, Lanci's trial strategy (including his decision to testify) was necessarily and substantially affected. Since Lanci's joinder with certain other defendants was only proper if the Organized Crime charge was valid, the Organized Crime statute being unconstitutional, the decisions of *Price v. George*, 398 U.S. 323 (1970), and *United States ex. rel Hetenyi v. Wilkins*, 348 F. 2d 844 (2d Cir. 1965), become most relevant.

[4] *R.C. of Ohio*, §2945.20 expressly provides that, absent good cause, persons jointly indicted for "capital murder offense should not be jointly tried." Given the fact that *Bell v. Ohio*, 438 U.S. 637 and *Lockett v. Ohio*, 438 U.S. 586 were only decided on July 3, 1978, it can hardly be denied that this case was a capital case when the trial commenced.

Though distinguishable from the facts here, these cases show beyond dispute that significant prejudice perforce results from the joinder of a constitutionally barred charge (here, the Organized Crime charge) with permissible charges. Such joinder raises a problem of constitutional proportion. In this case then, the fact that the trial court specifically instructed the jury on conspiracy and complicity theories as to the two substantive offenses verifies the existence of a critical issue as to whether this petitioner was prejudiced in a constitutional sense. This fact bars any possible conclusion that the same could be viewed as harmless. *Chapman v. California*, 386 U.S. 24 (1967).

In amplifying the position here being taken, it should be understood that we recognize the *Price* and *Hetenyi* decisions both involved the joinder of lesser included offenses with greater ones stemming from the same transaction. In *Price*, where there was a second conviction on the lesser charge, the Court concluded that the constitutional right there involving (double jeopardy) was "cast in terms of the risk of hazard of trial or conviction, not the ultimate consequences of the verdict" (398 U.S., at 311). The *Hetenyi* Court, in dealing with the same issue, concluded that:

"Both the existence of this possibility of prejudice and the fact that it arises from a violation of the accused's constitutional rights render the process which resulted in his detention constitutionally inadequate, less than that which is constitutionally due." 348 F.2d, at 864.

Obviously then, "the question here is not whether the accused was actually prejudiced [by the inclusion of the Organized Crime charge in this indictment], but whether there is a reasonable *possibility* that he was prejudiced" (348 F. 2d, at 864 [emphasis in original]).

Thus, we contend that because the petitioner was forced to defend against the Organized Crime charge, he was victimized by a prejudicial "spillover." (Since this charge was based on an unconstitutional statute, the evidence relating thereto, or even the existence of the charge itself, by right should have played no role in the determination of the issues involved in the other charges.)

In addition, we contend Lanci's defense to the various substantive charges was further prejudiced by the fact that his defensive energies were dissipated by the need to devote so much time and effort to the numerous evidentiary and other related issues raised by the Organized Crime charge. This is particularly so with reference to the mountains of prejudicial evidence showing activities by others which constituted the bulk of the evidence in this case dealing with the theft of certain FBI documents.

This contention is emphasized by the court's ruling (R 5748) specifically indicating at the close of the State's case that, in his judgment, "there was sufficient credible evidence both direct and circumstantial to support" the charge of Organized Crime--a ruling that required this defendant to present a defense to this charge. The fact that this ruling also influenced Lanci's decision to testify is only an aspect of the problem.

(B)

In emphasizing the point here, it should be noted that the State contended the Organized Crime Count was based on the fact that there was involved, as between those on trial and others, a "criminal syndicate" (R 7165) and that the facts here showed "evidence of gambling" on "a continuing basis or even a sporadic basis" (R 7167).

Thus, it is most significant that, despite his original denial of the Rule 29 Motion when the same was made at the close of the State's case (R 5749), the trial court ultimately dismissed the Organized Crime Count. Implicit in his ultimate determination to dismiss the Organized Crime Count are certain very critical findings of fact. Here, the court stated:

> THE COURT: All right. Okay. Anyone have anything further?
>
> I am persuaded here that the State has not established the third count of the indictment by introducing proof that five or more persons, among them these three

defendants, collaborated to promote or engage in the offense on a continuing basis to the offense of gambling.

The first part of the arguments that you made, I would agree with, those made by Mr. Cain and Mr. Lipold. But I have to look at the whole statute, and the evidence that is before this Court, which under Rule 29,...now that I have a chance to look at all of the evidence in this case, I am persuaded that the third count should not be submitted to the jury.

I do not know how I could submit to the jury an argument that five or more people are involved in a criminal syndicate without naming them, without allowing them to refer or make inferences that we are referring to six people who have already been found innocent.

And secondly, *I do not think that the evidence is sufficient, based upon what has been stated here, and giving Mr. Ferrito's testimony the widest possible inference in favor of the State, that he has established the corpus of the crime of a gambling offense, and that these people have been involved in it.*

Okay. For those reasons the Court will dismiss the third count of the indictment against each defendant.

(R 7172-7174 [emphasis added].)

In its discussion of the above points, the appellate court concluded its analysis with the contention that evidence admissible *solely* because of the Organized Crime charge (based, as it was, on an unconstitutional statute) had prejudiced the defendants with the bland *assertion* that "[they] waived this possible irregularity in the proceedings below" (Appendix "C", p. A3).

Hopefully this Court will understand our assailment of the position as expressed throughout Section IV of the Opinion is total. *First* of all, there is really no need to *assume*, as the Court does, "that the jury considered in its deliberations evidence probative only of the dismissed count" *(ibid).* The fact that this happened is clear, unambiguous, and beyond dispute. For the court doubtless must have been convinced this is so. Otherwise, it would not have written that "much, if not all, of the evidence admitted as probative of the organized crime count was also probative of the aggravated arson and aggravated murder counts" *(ibid).* On the other hand, had the court been persuaded otherwise, the word "all" instead of "much" would have been used in the independent clause of the sentence referred to and there would have been no need for any subordination.

This brings us to the appellate court's ultimate conclusion, in this segment of its Opinion, to the effect the defendants "waived this *possible* irregularity" *(ibid* [emphasis supplied]*) and* that, in any event, "the court's failure to instruct the jury was harmless." Obviously, the court somehow satisfied itself that the reason the trial court did not strike or otherwise correctly deal with *the evidence* bearing on the Organized Crime charge was because defense counsel did not make the request that he do so *(ibid).* Implicit in the court's declaration is the rather farfetched suggestion that the trial court would have acted appropriately -- or at least differently.

Our position on this is that only a mistrial was proper since no curative instruction could possibly have corrected the situation. This is so for a number of reasons including the impossibility of the task of compartmentalizing the evidence for exclusion, or whatever, and then unringing the bell. However, and apart from the above contention, even a cursory reading of the Record reveals a confutation of the appellate court's incredible conclusion that no request for any limiting instructions, as to this evidence, was made (Appendix "C", p. A3). Specifically, among numerous other motions and objections previously made dealing with this

*testimony*, the Record *also* shows that, in the wake of the dismissal of Count III, *counsel specifically* asked the court on more than one occasion for directions as to how the *testimony* bearing on the Organized Crime charge should be dealt with. Here, the Record shows for all to see:

> MR. FRIEDMAN: May I ask the Court a question?
>
> THE COURT: Some of you have a 4:00 hearing. We have got to finish the arguments on the first and second count; so would you go briefly?
>
> MR. FRIEDMAN: May I just ask the Court one question regarding that? I appreciate it, and I thank the Court for its ruling.
>
> In argument, Your Honor, *will the Court limit that evidence that came in*, and *I realize the Jury's already heard it*, but as far as limiting us as to, or limiting the State or the Defense from suggesting or going into any of the arguments or any of the *testimony of any witness that related to the third count.*

Also, the Record shows that, after further debate on other housekeeping matters, the defense again brought up the question as to restrictions the court should put on the evidence admitted on the basis of the Organized Crime charge. Here the Record shows:

> MR. FRIEDMAN: Your Honor, I would join in, but also I would just like to make one more suggestion and I will be finished, Your Honor.

*I would also move the Court at this time, for the record to limit the prosecution from making any reference in their closing arguments to any matters relating to count number three, engaging in organized crime, including the exhibits that were introduced for that particular count.*

THE COURT: All right.

MR. CARNES: I don't think, Your Honor, I join in that, but I don't think that's a matter that can be left up to the discretion of counsel. And I would hereby request that the Court now go over all the exhibits and rule what exhibits can be commented on and which ones will be excluded.

(R 7212-7213)

* * *

(Thereupon, the jury was escorted back into the courtroom, whereupon, the following proceedings were had in open Court.)

THE COURT: Good afternoon. We have been working, and I hope you have enjoyed the day's rest.

* * *

Now, ladies and gentlemen of the jury, I am withdrawing from your consideration the charge of organized crime, which is the third count in the indictment.

The attorneys therefor will argue the charges of aggravated arson and aggravated murder, and the Court will instruct you only upon those two charges.

Now, why the Court has withdrawn the third count should not be discussed or speculated upon in any way as you listen to final argument or when you retire to deliberate.

O.K. All right. Now, if you are ready, Mr. Lipold, you can proceed.

MR. CARNES: Judge, may I approach the bench before he begins?

THE COURT: All right.

(R 7224)

* * *

THE COURT: There are objections to various exhibits, particularly the checks and so forth.

MR. CARNES: State's Exhibit 101-C, State's Exhibit 101-B, State's Exhibit 204, and State's Exhibit – I don't know what it is.

MR. FULTON: *This is part of the documents with Lanci's prints on them. This is one of them.*

MR. CARNES: Which number is it? Is 109.

MR. FRIEDMAN: 106, isn't it?

MR. CARNES: No, it's 109.

MR. VALORE: 109.

THE COURT: All right. The Court rules that these exhibits may be used by the prosecutor in final argument.

Taken exception by all three defendants.

MR. CARNES: Judge, in the aspect of courtesy to Mr. Lipold when this is mentioned during the course of the final argument, we will not object but –

THE COURT: *You will take a continuing objection to any references to exhibits which might have some relation to the dismissed third count.*

MR. CARNES: *Fine. Thank you, Your Honor.*

(R 7226)

A liberal reading of the above quotes shows counsel *did* request the court place restrictions on the testimony that bore solely on the Organized Crime count – the dismissed charge.

Again, as had been argued before to the court, the obligation of the trial judge to sufficiently charge the jury on the various issues in the trial, including instructing them as to any limitations on the evidence, is a particularly heavy responsibility. This responsibility exists apart from, and even in the absence of, any request or objections by defense counsel. Applied here, particularly since this cause was tried as a capital case, it is simply unfair for this Court to declare this petitioner was to carry the whole blame. At the very least, to the extent the defense may have had a shared responsibility with the court to see to it that the jury was properly instructed, such was surely discharged when counsel *specifically* asked the court to indicate the limitations it would impose on the "testimony of any witness that related to the third count" (R 7175).

But even this is not all. The fact that the trial court expressly authorized the prosecutor to argue (as shown above) some of the exhibits that could only have been admitted in support of the third count shows, beyond cavil, that the making of a more specific request would have, in any event, been an exercise in futility.

The court below has concluded: (1) that "appellants failed below to request that the trial court eliminate...[any] potential for prejudice by instructing the jury to not consider evidence probative of the Organized Crime count only" and, for that reason, there was no gross infirmity in the trial. Also, the court concluded that, in any event, they were not

prejudiced because the error did not result in a "manifest miscarriage of justice." (Appendix "C", p. A3).

Again, the contention is being made that it was the trial court who allowed the defendants in this trial to be prejudiced by evidence that tended to show, as against those charged as "conspirators" and syndicate members, the commission of other crimes for which they had not been charged.

In defending the admission of this evidence, the Court should understand the State argued to the appeals court that the trial court properly admitted this evidence because it was "relevant to show the conspiracy to kill not only Danny Greene but also his associates" *(Answer Brief,* p. 22). Indeed, as put by our erudite prosecutor, this evidence *was not* " 'other acts,' but a series of acts within a continuing course of conduct to accomplish criminal purpose of which this death was one purpose" *(id.,* at 24).

However, in ignoring the issue as framed by the adverse contentions of the parties, the court of appeals proceeded to tell us something entirely different happened at the trial. We are told not only that the evidence (being referred to) was actually admitted by the trial judge under favor of *R.C. of Ohio,* §2945.59 but also that, had the request been made by the defense as it should have been, the trial judge surely would have given the jury "an instruction on the limited purpose for which this evidence" could only "be considered by the jury." Since none was requested by the defendants, as the court of appeals saw it, "they waived any error in the court's omission to so instruct" (Appendix "C", p. A3). Not only this, we are told no "manifest miscarriage of justice" could possibly have resulted *(id.,* at A3).

**II Where Proof Of The Crime For Which The Accused Was Acquitted Was Also An Essential Element Of, And Is Necessary To Sustain, A Conviction Of The Crime For Which He Was Convicted; The Guilty Verdict Must Be Regarded As Invalid.**

In this case, the State adamantly contended that a conspiracy existed as between the petitioner and others to kill Danny Greene. Given the acquittal of Licavoli, Lonardo, Sinito and Calabrese in the previous trial; one must surely question the ability of the State to still contend those indicated above were nonetheless members of such conspiracy. Seemingly, a routine application of the collateral estoppel doctrine of *Ashe v. Swenson,* 397 U.S. 436, 442 (1970), should have barred the State from even asserting to this jury such a contention as a viable basis for a conviction of those who were on trial in this case.

The starting point for this analysis is (a) the aforementioned acquittals, (b) the jury's acquittal of Calandra in this trial, augmented as it was by the court's acquittal of Lanci, Ciarcia and Calandra of the Organized Crime charge before the case was submitted to the jury, (c) the jury's acquittals of Lanci and Ciarcia on Count I, the Aggravated Arson charge *and* (d) their acquittal on both specifications--that is, "for hire" and/or while committing Aggravated Arson. These circumstances create issues that appear both novel and complicated.

The question then is whether these various acquittals (to which reference has been made) of the precise crime that formulated the sole and only possible predicates for the Aggravated Murder charge for which Lanci and Ciarcia were convicted -- that is, the Aggravated Arson charge and the specifications under the Murder charge rendered the Murder verdict so inconsistent as to be repugnant and thus require reversal and dismissal of the indictment? See *People v.*

*Edwards*, 402 N.Y.S. 2d 619, 61 A.D. 2d 1016 (1978); *People v. Perez*, 400 N.Y.S. 2d 559, 60 A.D. 2d 656 (1977); *In R. Kirby*, 50 Ill. 3d 915, 365 N.E. 2d 365 (1977) and *State v. Cates*, 223 Kan. 724, 576 P. 2d 657 (1978).

In *Edwards*, the New York Court specifically held that:

> "[T]he acquittal of the lesser included offense of grand larceny, coupled with the defendant's conviction of the higher offense of robbery, renders the verdict repugnant and requires reversal and dismissal of the indictment" (402 N.Y.S. 2d, at 620).

In *Perez*, the same New York court determined that:

> "Defendant's involvement in the transaction was so clearly established and so well documented that the only way in which he could have been acquitted of criminal sale of heroin was for the jury to find that he was an agent of the police officer who purchased the heroin. Having accepted the defense of agency, the jury could not properly have found defendant guilty of criminal possession of a controlled substance with intent to sell...Accordingly, the conviction of criminal possession in the third degree must be reduced to conviction of criminal possession of a controlled substance in the seventh degree" (400 N.Y.S. 2d, at 559).

In *Kirby*, the Illinois Court took a comparable position when it concluded that:

> "Respondent was acquitted on the charges of battery negat[ing] any finding of mob action based on the use of force or violence by two or more persons as well as any theory of accountability by Alfred Williams."

Hence, guilt of mob action was not established.

In the Kansas case cited above *(i.e., Cates)* the court reasoned that:

> "[A]s the case turned out defendant was acquitted of the firearms charge. The jury, no doubt, found the barrel of the gun in excess of twelve inches. Therefore, the possession of the gun by defendant did not amount to a felony in the minds of the jurors."

In fully assaying the thrust of our contentions here, consider California's approach to situations of this ilk. Here we refer to §954, *California Penal Code,* which expressly provides that "an acquittal on one or more counts shall not be deemed an acquittal on any other count. Doubtless, this statute was specifically enacted to avoid any assumptions that a verdict on a particular count necessarily disclosed what the jury was thinking. Yet, despite this statute (and Ohio seemingly does not have a comparable statute) the California Courts recognize that:

> "...[T]here is a limited judicial exception to this rule where all of the essential elements of the crime of which the defendant was acquitted are identical to some or all of the essential elements of the crime of which he was convicted, and proof of the crime of which the defendant was acquitted is necessary to sustain a conviction of the crime of which the defendant was found guilty...This occurs, for example, where a conspiracy count alleges as the only overt act a crime set forth specifically in another count, and the defendant is found not guilty of the specific crime, but is found guilty of conspiracy; such an inconsistency invalidates the conspiracy conviction." *People v. Hamilton,* 80 Cal. App. 3d 124, 145 Cal. Rptr. 429, 432 (1978).

We concede there is certainly authority for the position that "[c]onsistency in a verdict is not necessary." And we agree that "[e]ach count in an indictment is regarded as a separate indictment." *Dunn v. United States*, 284 U.S. 390 (1932). Still, it cannot be denied the cases resolved on the basis of this generality all dealt with crimes that were mutually exclusive. Such, however, is not the case here.

In this case, the charges were submitted to the jury in rather precise language. As specifically appears in the court's written charge, *Count I* – the Aggravated Arson charge was said, by the trial judge, to be based on the State's contention that the defendants on "October 6, 1977, unlawfully and purposely and by means of fire or explosion, knowingly created a substantial risk of physical harm to Daniel J. Greene..." (R 7640). *Count II*, the Aggravated Murder Charge [5] (–that is, the charge that the defendants actually *caused* the death of Daniel Greene on October 6, 1977) was said to have occurred "while [they] were committing or attempting to, or while fleeing immediately after committing or attempting to commit aggravated arson" (R 7641).

As to *Specification One* under the Aggravated Murder charge (Count II), it was stated without equivocation, "that *the offense above [i.e., the aggravated murder]* was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated arson" *(ibid* [emphasis supplied]). *Specification Two* stated the Aggravated Murder charge particularized in Count II was committed "for hire" *(ibid)*.

[5] The court *categorically* charged the jury that "Aggravated Murder, under the facts of this case, is the purposeful killing of another while committing Aggravated Arson". Continuing, the court specifically and most unequivocally indicated to the jury that:

> "[The] elements of the offense of Aggravated Murder in this case are as follows:
>
> (1) Purposely cause the death of another:
> (2) while committing;
> (3) aggravated arson."

In a further instruction given at this juncture, the court stated " 'purpose' is a decision of the mind to do an act with a conscious objective or producing a specific result -- in this case, killing Daniel J. Greene."

Again, the Record is clear. Both Lanci (R 7702-7703) and Ciarcia (R 7703-7704) were acquitted of Aggravated Arson and the two specifications under Count II of the Aggravated Murder charge.

Given the fact that the evidence in this case shows beyond dispute that Danny Greene died (as put by the Coroner and further established by a virtual mountain of evidence) as a direct consequence of being blown up--an act of Aggravated Arson in its most elementary sense, no one can possibly argue such was not the *cause* of Daniel Greene's death.

So postured, the effect of these acquittals is that there is simply no way anyone, including the court, and certainly not the prosecutors in this case, can ever formulate even a hypothetical pattern which could have lead the jury to reach, by an appropriate reasoning pattern, the required conclusion that Lanci and Ciarcia *caused* the death of Danny Greene as indicated in the jury's verdict.

In segment V of its Opinion (Appendix, p. A7), the court simply forced the *peculiar* facts here involved into a simple mold and then resolved the issue against the Lanci and Ciarci on the basis of general principles. While we surely recognize the *general* rule with reference to inconsistent verdicts, and we are keenly aware of all cases cited by the court along with many others, still it is our opinion the cases relied on by the court are beside the point. In addition, more than logic is offended by resolving this case on the basis of the authorities relied on, or on the basis that "no internal inconsistency" was present, within the aggravated murder verdict. was present, within the aggravated murder verdict.

Despite the court's apparent confidence in the position it has adopted, one wonders why no references were made to any of the various cases cited to that court in the Briefs filed by the appellants. It had been hoped that the court would at least discuss the possible impact of *Ashe v. Swenson*, 397 U.S. 436 (1970). Especially given our contention, made

there and here, that the cases relying on the *Dunn* approach (and such is certainly true of the Ohio cases cited by the court) all deal with crimes that were "mutually exclusive." Here, of course, even a cursory reading of the Record shows these appellants were found *not guilty* on a count and a specification which were identical to essential elements of the crime for which they were convicted.

Perhaps the closest case to what we have here that can ever be found is *State v. Fling*, 69 Ariz. 94, 210 P. 2d 221 (1949), a case that expressly followed the rationale used in the *Hamilton* case cited to the appellate court *(Appellants Brief*, p. 44). In *Fling*, the court dealt with an *aggravated* assault conviction in which the *aggravation* was charged as being the fact that the defendant assaulted the victim *in his home*. The jury had acquitted Fling on a separate charge of assault with a deadly weapon. Based on the evidence, if an assault took place *in the home*, it was with a deadly weapon.

It was based on these facts that the court dealt specifically with the following proposition:

> "[W]here two or more crimes involve an element essential to each, an acquittal on one bars a conviction on the other, provided the evidence of the essential element is the same in each case." *Fling*, at 223.

In resolving the issue, the Arizona Supreme Court concluded that:

> "...[T]o sustain...[the] aggravated assault charge, it...is essential that an assault should have occurred in the home. Under the State's evidence the only assault in the home was with a deadly weapon, but the verdict negatives such an assault" *(id.*, at 223).

Thus the court concluded the verdicts were irreconcilable and contradictory and, for that reason, invalid. The bottom line on that court's position, in which it dealt with the *Dunn* and *Steckler* cases relied on by this court, was that:

> "Whenever a jury finds the defendant not guilty of a count in which is charged an act which forms an essential element of another count, a conviction on the second count cannot be sustained." *Fling*, at 224.

This point the Arizona Court backed up with a reasoning pattern that seems especially compelling:

> "The not-guilty verdict established that the defendant made no assault with a deadly weapon, and, as a necessary consequence, that he made no assault in the home. The issue was clear cut: its determination was solely within the province of the jury. The finding of the jury is conclusive. *The guilty verdict, having no factual basis, is nullity." Fling*, at 224.

Hopefully, a fuller consideration of this case than was given by the court of appeals will impel this Court to adopt a more enlightened approach to this issue, one that does not offend due process. Surely such is needed for a number of reasons and this case is ideal for that purpose.

In any event this case, perhaps more than any other in recent years, exposes the wrongs done in individual cases when extremely complicated and sophisticated issues are resolved as they were here – on the basis of general principles. Here we refer to the appellate court's treatment of the analytical problems involved in the various contentions made by the petitioner Lanci concerning the "inconsistent" and "repugnant" verdicts in this case. For, while critical aspects of this issue have produced considerable literature (see *e.g.*, Anno, 18 A.L.R. 3d 259 [1968]), such did not cause our court any problem. For them the problem was both routine and simple.

But, of course, this really is not the case for there has been much confusion and many conflicts in this area. Most of it was spawned by the decision of *Dunn v. United States,* 284 U.S. 390 (1932). Significant here, it was from *Dunn* that our court extracted a Hornbook principle and, without any analysis, rather arbitrarily concluded the presence of the gross inconsistencies in these verdicts were inconsequential. For our part, the peculiar facts in this case show out-and-out acquittals for the crime of Aggravated Arson. Guilt of the crime of Aggravated Arson was a most essential element of the crime for which the petitioner was indicted and ultimately convicted -- that is, causing the death of a Danny Greene while committing Aggravated Arson. This being so, the critical questions here cannot be regarded as controlled by the mere citational reference to the *Dunn* decision. Simply put, the pivotal issue can be stated as follows: can a conviction survive constitutional scrutiny where there has been a clear-cut acquittal on a specific charge that was an essential element to, and inherent in, the charge for which the conviction occurred?

Contrary to the court of appeals, whose conclusory reasoning pattern stops with *Dunn v. United States,* ours begins with *Dunn.* A reading of *Dunn* shows the Court affirmed his conviction for maintaining a nuisance by the possession of liquor for sale despite the fact that Dunn was acquitted of possessing the same liquor for sale. A study of the decision shows it was grounded on two rationales. *First,* the Court, relying on the rule that issues that were resolved in one trial "[may] not be pleaded as *res judicata* in a second trial," concluded that "each count in an indictment is [to be] regarded as if it... [were] a separate indictment" *(id.,* at 393-394). *Second,* the Court credited the jury's verdict with a sanctity that prohibits inquiry into possible mistakes or compromises. As put by the Court, "verdicts cannot be upset by speculation or inquiry into such matters" *(id.,* at 394).

Starting with *Dunn's* "separate count" rationale -- that is, that courts need not concern themselves with considering the logic of jury verdicts; it can hardly be denied that the major premise relied on for this holding in *Dunn* has been seriously undermined and undercut by the more recent development in the law of collateral estoppel. Here we refer to such cases as *Ashe v. Swenson,* 397 U.S. 436 (1970), and *Sealfon v. United States,* 332 U.S. 575 (1948). It is our considered judgment that these cases (particularly *Ashe v. Swenson* which was cited to the courts below) have decimated and fully confuted the foundations of the *Dunn* decision which were erected on the Court's premise that the ability to relitigate the same issues and reach opposing results in separate trials should be extended to multiple counts in a single trial. See *United States v. Zane,* 495 F. 2d 683, 691 (2d Cir. 1974), where the court reasoned that a conviction on substantive counts was viewed as inconsistent with acquittal on a conspiracy count when such acquittal "constituted a determination favorable to the petitioner on the facts essential to conviction of the substantive offense."

As to the other rationale of *Dunn* (to the effect that most inconsistent verdicts are simply benign gestures of mercy on the jury's part), such must be deemed an assumption, at best. Specifically, an assumption that has never been tested or proven. Aside from the fact that reliance on any assumptions to justify a verdict would be a serious affront to constitutional principles, *In Re Winship*, 397 U.S. 358 (1970); it can hardly be denied that jury inconsistencies such as we have here could very well signify that the jurors were not convinced of the accused's guilt of any crime beyond a reasonable doubt. In the wake of this possibility, only a prosecutor would argue that the risks inherent in accepting inconsistent verdicts are outweighed by the considerations supporting acceptance of inconsistent verdicts on the basis of an unproven assumption.

Stated another way, and this is the essence of our contention on this point because it also exposes the basic weakness in the appellate court's summary treatment of this issue,

given the context in which we have shown the verdicts here are both "inconsistent" and "repugnant," it is simply no answer to remit us to *Dunn* as being dispositive. For our part, the inconsistent verdicts returned by the jury in this case *on the identical facts* alone create a reasonable doubt as to Lanci's guilt of any crime.

**III. An Accused Is Denied Due Process, And Otherwise Substantially Prejudiced, When Any Of The Following Circumstances Develop Or Occur:**

**(A) The State argues in support of the admission of evidence showing other crimes, wrongs or "similar acts," that such evidence is properly admitted: (1) as evidence generated in furtherance of a "conspiracy", (2) as evidence of "similar acts," and (3) as evidence tending to prove the existence of a criminal syndicate and thus a violation of a statute later declared unconstitutional and the trial judge fails to prevent the possible misuse of such evidence by the jury.**

**(B) There is admitted as substantive proof considerable evidence showing other crimes and wrongs, which evidence did not qualify for admission under the State's similar acts statute (R.C. of Ohio, §2945.59), the statute under which such evidence was tendered.**

**(C) Assuming the evidence referred to above qualified for admission under the above-indicated statute, the admission of such evidence as substantive proof of the charges made in the indictment cannot be justified in law, logic or common sense.**

In this case, the trial court, in our judgment simply because the State was adamant about their wanting to do so, allowed the State to present considerable evidence that did not bear directly on the charged crimes. Here, we refer to certain testimony by Louis Aratari dealing with "subsequent acts after October 6th" (R 2199-B), the day of the Greene bombing, and testimony by the Rabinowitzs and others dealing with certain sealed FBI documents.

The State indicated, at one point, that some of this evidence was admissible under the "similar acts statute" (R 2199-E). The view was further articulated that the State had "shown *prima facie* evidence of a conspiracy to kill the Irish Gang" (R 2199-F). In the prosecutor's judgment, part of that conspiracy "was the death of Danny Greene, and the continuing course of that conspiracy...was up until February 28, 1978, when... Aratari was arrested in Middleburg Heights carrying fruits of the crime of conspiracy to engage in Organized Crime"[6] *(ibid).*

Further amplifying these remarks, while actually exposing his lack of knowledge even as to some of the most elementary tenets of conspiracy law, the prosecutor taxes our credulity by taking us full circle with the sagacious observations that the "law of Ohio indicates that under the criminal syndicate charge the persons involved in the conspiracy need not know the identity of each other... [and that acts of the ilk here involved] can be brought in during the continuing course of the conspiracy up until after the cover up phase" (R 2199-P).

(A)

Among the patent flaws in the prosecutor's sermon is the fact that the indictment did not charge conspiracy as an offense. Thus the conspiracy concept was only applicable here from an evidentiary standpoint. And, the prosecutor's two crimes were separate and distinct; hence, there was no merger of the conspiracy into the agreement implicit in the idea of five (5) or more people that was required to form an illegal gambling business (420 U.S., at 791).

In *Jeffers,* the facts show he was named in two indictments. *One* indictment charged Jeffers, along with nine (9) others, with conspiracy to distribute drugs (21 U.S.C. §846). The *Second* charged that he had acted "in concert with five or more other persons" in a continuing criminal enterprise (in violation of 21 U.S.C. §848). Jeffers was convicted in both cases despite his double jeopardy contentions. These same contentions were rejected by the Supreme Court.

[6] Indeed, contrary to the ravings of the prosecutor, there is no such crime in this State known as "conspiracy to engage in Organized Crime." See *R.C. of Ohio,* §2923.01.

Given *Iannelli* and *Jeffers*, the prosecutor's argument that (for aught that appears) was adopted by the trial court as the reason for allowing the evidence being assailed here simply cannot be validated.

Stated another way, any conspiracy to kill Danny Greene or even a conspiracy to form a "criminal syndicate" must be viewed as separate and distinct crimes. This being so, it defies logic to justify the admission of such evidence as acts or declarations made in furtherance of the "conspiracy" involved in the killing of Danny Greene. And, it is even more ridiculous to urge that such evidence was admissible to prove the existence of a "criminal syndicate" that had as its purpose gambling activities.

This brings us to still another segment of the prosecutor's stated basis for the admission of the evidence being assailed. Here we refer to his ramblings about a "cover up phase" or concealment phase of "the conspiracy" (R 2199-O to 2199-P). It can be taken for granted the prosecutor never even heard of *Gruenwald v. United States*, 353 U.S. 391 (1957). For if he had, there is no way such an argument could have been made in face of the principle that:

> "After the central purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." (353 U.S., at 401-402.)

Still other statements by the prosecutor betray him as being misinformed. Here, in referring to the stolen FBI documents, he argued "the charge here is maintaining a criminal syndicating... and it is our contention that these documents were stolen for the purpose of maintaining a criminal syndicate. That is the reason for it" (R 2199-J to 2199-K).

Here we start with the fact that the court ultimately determined (R 5749) there was no evidence showing the existence of a "criminal syndicate," as that entity was defined in our statutes, *R.C. of Ohio*, §2923.04(C). Despite this holding, the court was convinced by the State to allow evidence showing the corruption of the Rabinowitz and the theft and retrieval of certain documents stolen from the FBI. The fact that the jury regarded this evidence as substantive proof against those on trial is only an aspect of the problem.

Since the defense had sought by a Motion in Limine (R 3533) and by a Motion to Strike (R 3800), and otherwise to exclude and restrict this evidence, such efforts should emphasize the intensity of our present complaint. For the harm this evidence did to Lanci's defense is most evident.

The prosecutor argued the FBI documents and the testimony relating to them "were part of the conspiracy to kill Danny Greene, and the conspiracy to participate in Organized Crime in the Cleveland area" (R 3564). The Record, of course, shows a continuing objection to the entirety of this evidence (R 3611-3612). This position the defense augmented with the specific contentions that none of this evidence had any "concern with the death of Danny Greene and that... [even the witness, Mrs. Rabinowitz had], admitted that there was no information sought [from her] relating to Mr. Greene..." (R 3800.) These observations, joined in by Lanci's counsel (R 3802), were further coupled with the request that the court give a limiting instruction (R 3800-3801). None was given.

(B)

Again, the prosecutor's response to all this shows he was literally confounded by the complicated evidentiary problems involved in this case. Here, he stated that it would be proper for the court to charge with reference to this evidence under §2945.59 (R 3802). In our judgment, this particular statement is verification of his total obliviousness to the fact that this evidence, if it was admissible on the theory that such activity occurred in furtherance of a conspiracy (as the

State repeatedly argued), was admissible as substantive evidence. Evidence admissible under §2945.59 is for a very limited purpose and not as substantive proof that the accused committed the crime charged. See *State v. Curry*, 43 Ohio St. 2d 66 (1975). In *Curry*, this Court expressly approved the appellate court's reversal in the following language:

> "Where evidence has been admitted for a limited purpose, which the state claims shows that the defendant did certain 'other acts' which show the motive or intent of the accused or absence of mistake or accident on his part or the defendant's scheme, plan or system in doing the act alleged in the indictment, such evidence must not be considered by the jury as any proof whatsoever that the accused did any act alleged in the indictment." *Id.*, at 74.

It cannot be denied, as our court of appeals has so cogently recognized in *State v. Roberts*, 62 Ohio St. 2d 170 (1979), the danger of a "spillover" effect, which can be contrasted with the effect related to evidence showing a "criminal propensity" is "exemplified by a situation in which 'the evidence as to each charge is not readily referable to the crime with respect to which it is introduced.' " *Id.*, at 4.

Doubtless, it was because of the above indication by the appellate court of the existence of a "spillover" problem in cases of this ilk (especially when there is also involved aspects of our "similar acts" statute) that the court specifically determined that:

> "In a joint trial of two or more offenses, any doubt that the R.C. §2945.59 evidence is simple, distinct, and readily referable to the charge with respect to which it is introduced must be resolved in favor of the accused. All potentially relevant factors should be considered to determine whether there is a substantial likelihood that prejudice will arise. The potential for prejudice must be under constant scrutiny during the trial. Appropriate measures must be taken at trial if prejudice surfaces or a substantial likelihood exists that it will." *State v. Roberts, supra*, at Syllabus 3.

What surfaces from these cogent references to *Roberts*, when the same are related to the facts here *and* to the various arguments made elsewhere in this Memorandum, are certain required conclusions. *One*, the trial court admitted as substantive proof the Aratari testimony relating to his efforts to eliminate Brian O'Donnell and Keith Ritson; as well as, the testimony showing the Rabinowitz caper. The entirety of this evidence dealt with inferences, which can in no way be regarded as "simple and direct" *Two*, the trial court did absolutely nothing to reduce the obvious potential for prejudice created by this evidence. This is so even if the evidence was proper for the jury to consider for any purpose against any defendant. And, *three*, as a consequence of the above-indicated facets of this case, the jury's consideration of this evidence must be regarded as having occurred in violation of due process. *Drew v. United States*, 331 F. 2d 85, 88 (D.C. Cir. 1964) and *United States v. Lee*, 428 F. 2d 917, 921 (6th Cir. 1970).

It may suffice, and hopefully it does, to suggest that based on the decisions of *State v. Curry*, 43 Ohio St. 66 (1973) and *State v. Flonnory*, 31 Ohio St. 124 (1972), this Court truly felt the problems attendant to the use of our similar acts statute (§2945.59) had been identified and resolved. Doubtless too, this Court felt, as did most defense counsel, that absent a real *necessity* to establish some relevant material fact (and those are specifically set forth in the statute itself) such evidence is simply not admissible. And, this Court was probably encouraged in this belief by such cases as *State v. Smith*, 59 Ohio App. 2d 194 (1977), and even from reading *State v. Roberts*, Cuy. Cty. No. 37848, in route to your decision in the same case (62 Ohio St. 2d 170 [1980]). But as this case clearly shows, hopefully not because the great public and general interest blinded the court, the lessons thought to have been learned were simply ignored by the court of appeals below.

[7] Indeed, it is most significant that another of the prosecutors involved with the Greene murder trials, in dealing with *some* of this same evidence, argued to our appellate court that "the trial court [in the previous trial] properly limited both the State and the defense to that evidence that was relevant to the murder of Greene. The fact that Aratari got grenades from Cisternino to kill Ritson, or that he was arrested while on the prowl to kill Brian O'Donnell are totally irrelevant to the issues of this case." *State v. Carabbia*, No. 39916, *Answer Brief*, pp. 36, 39.

As is well known by those with any real experience in trying cases, there is a recognizable penchant, or proneness, for jurors to draw incorrect or illogical inferences from such evidence. Since the jury here was not given the proper guidance, even assuming the evidence herein being specifically assailed was admissible for the purpose suggested in the Opinion, it is simply no answer to say this was the fault of defense counsel and, for that reason, justice was not offended.

(C)

In this case, certain facts are clear beyond dispute. These include (a) the trial court's failure to indicate under what theory it admitted this evidence and, (b) the court's failure to give any limiting instruction to the jury. See *State v. Curry, supra,* and *State v. Flonnory,* 31 Ohio St. 2d 124 (1972).

Also *Ohio Revised Code* §2945.59, the statute relied on by the appellate court to blame defense counsel because considerable evidence was not properly restricted, simply does not confer any arbitrary discretion on the trial judge to admit evidence that qualified under the statute. Proof this is so, despite the willingness of the court of appeals to ignore this fact, is most apparent from the legislature's specific use of the discretionary word *may* in the statute with respect to the admissibility of such collateral proof.

Despite then, the contrary notions of the court of appeals, obviously what this legislature must have anticipated is that when the prosecutor invokes §2945.59 as the basis for admission of specific evidence, the trial judge must satisfy himself that the threshold prerequisites have been satisfied. This is surely different from saying, as was said here by the appellate court (Appendix "C", p. A3), that when evidence offered as substantive proof is objected to the defense must,

even if the objection is rejected, anticipate at the risk of being prejudiced that if the trial judge is wrong in his ruling on their objection, the evidence might nonetheless be proper for some collateral purpose.

Obviously then, this evidence cannot possibly be qualified for admission under *Curry*. On the other hand, assuming *arguendo* this evidence passes the *Curry* test, the failure of the court to conform to the requirements of *Flonnory* must still be reckoned with. Here we refer to the rather precise holding by our Supreme Court to the effect that:

> "Where evidence has been admitted for a limited purpose which the state claims shows the defendant did certain 'other acts' which show the motive of intent of the accused, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question which is alleged in the indictment, the jury should be instructed that such evidence must not be considered by them as any proof whatsoever that the accused did any act alleged in the indictment."

To be sure, it is a venerable principle that bars the use of evidence showing extrinsic offenses and acts of wrongdoing solely to demonstrate a defendant's bad character or to merely show simply that it is more likely than not the accused committed the particular crime then being tried. Such evidence is deemed inherently prejudicial. See *E.g.*, *Michelson v. United States*, 335 U.S. 469, 475-476 (1948). Thus, the law is that without an issue to which such evidence is relevant, the probative value of any such evidence is simply outweighed by this prejudice. Obviously then, the trial court should have first determined that this evidence was relevant to an issue in this case. Next, the court was required to make the determination that the probative value of this evidence was not outweighed by its undue prejudice.

The trial court not only failed to do any of these things, he also failed to give the jury any instruction as to any limited purpose such evidence may have served.

On the other hand, the clear impact of *State v. Curry, supra,* on *R.C. of Ohio,* §2945.59, clearly suggests, although it should be required, that when evidence is admitted for one of the purposes enumerated in the statute, the trial judge should articulate a statement showing his balancing of probativeness and prejudice. See *United States v. Mahone,* 537 F. 2d 922, 929 (7th Cir. 1976). *Cf., United States v. Sangrey,* 586 F. 2d 1312, 1315 (9th Cir. 1978).

Unfortunately, much confusion has continued to prevail with reference to the proper use of this statute. This is so despite some rather clear expressions by this Court (see, *e.g., State v. Flonnory,* 31 Ohio St. 2d 124 [1972]; and *State v. Hector,* 19 Ohio St. 2d 167 [1969]). And, if this case is any index, it is most clear the message seemingly has not gotten across to some of our prosecutors and trial judges.

Despite this fact, it was very recently recognized by another court in this State that, "evidence which of itself shows or tends to show the accused did some act for which he is being tried is admissible without limitation. It does not depend upon *R.C. of Ohio,* §2945.59 for admissibility." *State v. Smith,* 59 Ohio App. 2d 194 (1977). Significantly the *Smith* court specifically noted, in its syllabus, that:

> "Where the state presents testimony, without limitation, against an accused pertaining to his commission of other crimes, for which he has not been indicted, and the crimes bear no relevance to an element of the offense with which he is charged, the court's admission of such evidence is prejudicial error."

Faced with the reasons given by the State as to why this evidence was admissible (R 2199-E, 2199-F, 2199-J to K, 3564, 3611-3612), and the stern contentions by the defense that it was not admissible for such purposes (R 3533, 3601, 3612 and 3800), this evidence can only be said to have been admitted for the reasons urged by the State. The upshot of this required conclusion is, at least, two-fold. *One*, to the extent the trial court may have deliberately failed to indicate his own rationale in order to give any reviewing court the option of: (a) seeking some possible basis under which admission could be justified, and then attributing it to him; or (b) declaring the admission to have been, in any event, harmless error; the Court should, of course, recognize the prejudice visited upon those then being tried as having been gross. *Two*, the prosecutor having insisted to the extent that he did on polluting, and otherwise cluttering up, this Record with this collateral evidence, any argument by him that it was harmless should be regarded as insulting.

As to these points, the law seems to be most clear. It is regarded as "unfair for a reviewing court to consider evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at the trial." *United States v. Check*, 582 F. 2d 668, 683 (2d Cir. 1978). Also see *United States v. Brown*, 490 F. 2d 758, 763 (D.C. Cir. 1973), and *United States v. McClain*, 400 F. 2d 241 (D.C. Cir. 1971). The appropriateness of this idea here can only be augmented by references the *Check* decision makes to the rather sagacious remarks of Justice Cardozo in *Shepard v. United States*, 290 U.S. 96, 102-103 (1933). Here it was said, for a unanimous court (in a case that really focuses on an aspect of the evidence spectrum involved in this case) that where testimony was admitted for one purpose, the "trial becomes unfair if [such] testimony thus accepted may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." *Id.*, at 102-103.

The point involved in our emphasis of these latter arguments relates to the fact that the prosecutor will be

required to seek some basis, other than those advanced by him at trial, to justify the unfettered admission of this evidence. This being so, it seems only proper that he should specifically respond to the tenets articulated above rather than simply parrot for us a collection of general principles translatable into the idea that the admission here was discretionary or, in any event, harmless.

Stated another way, "[t]his Court is certainly entitled to expect candor from attorneys representing...[the prosecution]." *United States v. Ott*, 489 F. 2d 872 (7th Cir. 1973). Since it is so apparent the prosecutor, by the force of his ill-advised arguments, improperly prevailed upon the trial court to admit evidence for reasons that cannot be justified, full candor should require him to confess error. But, obviously this is really asking too much for we have already seen where one prosecutorial team argued to the court of appeals that some of this same evidence was not relevant, and the prosecutors in this case argued that it was.[8]

Next, it was under segment VI of the Opinion dealing with this proposition that the appellate court's reasoning reaches its zenith. Here again, the court imputes blame for the lack of needed instructions to those being tried. In convincing itself this was an appropriate conclusion, the court started its critical syllogism with what can only be regarded to be a flagrantly false premise. For the Record simply *does not* support the conclusion that "evidence of the other crimes, committed by the various principals involved in the evidence therein, was admissible against these appellants under *R.C. of Ohio*, §2945.59" (Appendix "C", p. A3).

Chief among the problems with the court's ratiocinations are certain irrepressible considerations: (1) *most* of the evidence was not offered by the State on the basis of §2945.59 (see *e.g.*, R 2199-2199/K); and (2) limiting instructions were specifically requested (R 3533) as were objections and motions to strike (R 3800-3801) made with reference to this testimony. In addition, the Record also fails to show that the bulk of this evidence was admitted for *any* of the collateral purposes indicated in the statute.

8 "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That (inconsistency between the actions of different prosecutors) was inadvertent does not lessen its impact." *Santobello v. New York*, 404 U.S. 257, 262 (1971).

But, even this is not all. To simply conclude the evidence was admissible for a limited purpose and was only considered as substantive proof because counsel did not request the appropriate limiting instruction, only begs the question. That question, simply put, is: Did the jury's consideration of this evidence as substantive proof deprive these appellants of a fair trial? If the answer to that question turns (as the court says it does) on the fact that defense counsel did not sufficiently object, then the conclusion is inescapable this petitioner *was denied the effective assistance of counsel.* This, in turn, is a consideration that must be deemed to have been rejected by our appellate court in the overall conclusion that no plain errors under Rule 52 are present anywhere in this case. As we see it, however, the position taken by the court in this instance punishes the accused because their counsel did not do a vain act.

**IV. An Accused Is Denied The Effective Assistance Of Counsel (A) When, As A Result Of His Counsel's Failure To Request Instructions Limiting Such Evidence To The Purposes Enumerated In §2945. 59, Considerable Evidence Was Considered As Substantive Proof Of The Charges For Which The Defendant Was Convicted; And (B) When, As A Result Of Counsel's Failure To Request An Instruction, Evidence Admitted Solely On The Basis Of A Charge For Which The Court Acquitted The Defendant Is Permitted To Be Considered By The Jury As Substantive Proof Of The Charges.**

An indisputable fact in this case centers on the idea that the credibility of Aratari and Guiles was absolutely essential to a successful prosecution. To the extent their credibility was bolstered and corroborated by inadmissible evidence, by evidence arbitrarily and unilaterally considered by the appeals court to have been admitted for limited purposes unrelated to their credibility, or by the believability of their testimony with reference to facts and events that properly should have played no part in the trial itself; the errors involved could not possibly be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 23 (1967). Also see *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

Our analysis of the above proposition starts with the idea that it surely is not the perogative of the appellate court to usurp the function of the jury and speculate whether, without the evidence wrongly admitted as substantive proof (as they put it, because counsel failed to object), the verdict would have been the same. Obviously then where, as here, prejudicial (or potentially prejudicial) evidence was improperly admitted, which admission was further augmented by the occurrence of other flaws, the assessment of their harm-

ful character is not only beyond the comprehension of appellate judges but anyone else's. This truly must be so unless the judges resolve themselves into a jury and ignore the findings based on incompetent evidence and significant flaws.

Our point is that regardless of whose fault it was that such happened, ultimately considerable evidence was offered by the State as substantive proof, was admitted as such by the court, and was so considered by the jury. Simply put, since the appellate court has affirmatively concluded that "much" of this assailed evidence was admissible for certain limited purposes (Appendix "C", p. A3), or would have been excluded if defense counsel had asked, amplifies the wrongs done this petitioner. This is so because, assuming this to be true *(i.e.*, that the court would have so instructed the jury), to penalize those on trial personally because their attorneys did not convince the trial court (despite counsels' correct objections to the evidence as offered) to admit some of this evidence as proof against their clients for such limited purposes really asks too much. *Cf., State v. Smith*,[10] 59 Ohio App. 194 (1977). The bottom line thus appearing is that the court of appeals was quite willing to offend the principle that appellate courts should not "consider evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at the trial." *United States v. Check*, 582 F. 2d 668, 683 (2d Cir. 1978). Also see *United States v. Brown*, 490 F. 2d 758, 763 (D.C. Cir. 1973), and *United States v. McClain*, 400 F. 2d 241 (D.C. Cir. 1971). The appropriateness of our criticism of their position can only be augmented by references in the *Check* decision to

[10] In *Smith*, contrary to the position taken by our Court of Appeals, it was concluded:

> "Where the state presents testimony, without limitation, against an accused pertaining to his commission of other crimes, for which he has not been indicted, and the crimes bear no relevance to an element of the offense with which he is charged, the court's admission of such evidence is prejudicial error."

certain rather sagacious remarks by Justice Cardozo in *Shepard v. United States*, 290 U.S. 96, 102-103 (1933). Here it was said, for a unanimous court (in a case that really focuses on an aspect of the evidence spectrum involved in this case), that where testimony was admitted for one purpose, the "trial becomes unfair if [such] testimony thus accepted may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." *Id.*, at 102-103.

Even this is not all. Our position here can be analogized to that very recently expressed in *United States v. Cain*, 587 F. 2d 678 (5th Cir. 1979). In that case, the court concluded that where cogent evidence (if admissible at all) is admissible for a very limited purpose, the danger of the jury misusing such evidence is simply too great to leave the accused unprotected by a sufficient instruction. Also see, *United States v. McClain*, 400 F. 2d 241, at 246 (D.C. Cir. 1971).

Our great fear here is that both of the courts below allowed both their's and the public's natural antipathy toward "organized crime" to cloud their perception of due process in these notorious "Danny Greene Murder" trials. For, it is at least arguable that the courts succumbed to the notion that "ornithological specimens of identical plummage congregate" and, for that reason, they rationalized that the appellants then before them received the justice they deserved. For our part, we shall continue to subscribe to the principle that the rights of the very best among us are only as secure as those of the worse are protected.

What is required here, which was apparently not done by the appellate court, is a gauging of the impact of the contention (made to the court in the Application for Reconsideration) that to the extent Lanci was prejudiced as a consequence of his trial counsel's failure to protect him in the instances noted by the court, he was denied the *effective assistance of counsel.*

In assaying these specific contentions, this Court should recognize that The Supreme Court has yet to authorize the use of the harmless error doctrine, or the aspect thereof, patterned by the appeals court in this case as the lack of a "manifest miscarriage of justice, to effective assistance of counsel contentions." Doubtless this has been so because, to them, the "overriding concern has always been the justice of the finding of guilt" *(United States v. Agurs,* 427 U.S. 97, 112 [1976]). Or, to put it otherwise, "the ultimate question of guilt or innocence...should be the central concern of a criminal proceeding." *Stone v. Powell,* 428 U.S. 465, 490 (1976).

Under this analysis, the Court would necessarily conclude that *if* counsel can be charged with having failed to request that evidence admissible in favor of §2945.59 be limited, then it follows Lanci was denied the effective assistance of counsel. The same conclusion would follow if it was counsel's responsibility to request the court take the appropriate action with reference to evidence admitted *solely* on the basis of the Organized Crime charge.

The cogency of this conclusion results from the fact that the assailed proof entailed the very real risk and danger, even if the jury had been properly instructed, that they would be confused to the detriment of the accused if called on to make conflicting interpretations of these essentially collateral events.

For our part, anyone who reads the Opinion below as it should be read, with a concern as to whether Thomas Lanci has been accorded due process, very quickly realizes critical aspects thereof were based on a rule structured toward a conclusion of harmlessness with reference to the presence of errors and flaws in the trial under review. For, if it were otherwise, rather than arbitrarily conclude, as it did: (a) that it was the fault of the defense counsel that the considerable segment of prejudicial evidence was admissible if limited to the appropriate collateral purposes (as it should

have been, if admissible at all), *and* (b) that the trial judge would have excluded other evidence admitted solely on the basis of the Organized Crime charge that was dismissed by him had the defense made the request; the court would have taken a vastly different approach.

What is being referred to is the tenet that "it is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial" *(Lakeside v. Oregon,* 435 U.S. 333, 341 (1978). In addition, it can hardly be denied that the prosecutor is under no less of a duty to see that the trial conforms to constitutional standards since his interest in a criminal prosecution is not that he shall win a case, but that justice shall be done. *Berger v. United States,* 295 U.S. 78, 88 (1935).

Yet, one gleans from even a cursory reading of this Opinion that, in determining that the undeniable misuse of evidence (evidence that was grievously prejudicial in our judgment) was harmless, the court of appeals focused exclusively on whether the verdict was supported by sufficient evidence. For our part, given the serious contention made to the court below that *if* Lanci's counsel can be properly faulted for not having taken the appropriate action in the specific areas delineated by the appeals court in its Opinion, then that court could not properly conclude Lanci was *not* prejudiced by these failures by his defense counsel.

(See Appendix "C", p. A3). This reasoning pattern is particularly compelling here since more emphatic proof of prejudice may well be absent from the Record precisely because counsel was ineffective. Alternatively then, the further contention being made is that where, as here, the ineffectiveness claim is founded on *omissions,* rather than specific acts of commission, counsel's ineffectiveness so permeates the adjudicative process itself that there is simply no way any court can realistically assess an incompetency of counsel claim as harmless by looking to the sufficiency of the evidence of guilt in the Record. This is so most of all because counsel's ineffectiveness *may* have so distorted the Record that it becomes an unreliable indicator of guilt itself. See *Holloway v. Arkansas,* 435 U.S. 475, 490-491 (1977).

Since it is literally impossible to gauge the prejudice that resulted from counsel's omissions, as The Supreme Court has made most clear, "The right to have the [effective] assistance of counsel is too fundamental to allow courts to engage in nice calculations as to the amount of prejudice resulting from its denial." *(Id.*, at 488.) Indeed, it must be regarded as clear from these cases that, at least as to our ineffective assistance claims, The Supreme Court has concluded such a showing "can never be treated as harmless error." *(Id.*, at 489, quoting *Chapman*, 386 U.S., at 23).

This reasoning looks then to the only conclusion that can accommodate these facts, a reversal is required.

## CONCLUSION

In all deference to the Ohio Court of Appeals, its decision in several highly significant areas cannot survive scrutiny. Because this is so, our challenge as against some of their reasoning patterns has been with arguments that can possibly be viewed as aggressive criticisms. As to this very real possibility, it is hoped the Court will understand we were guided by the perogative of counsel to vigorously assert with candor, however blunt, what he believes to be valid criticisms of judicial action taken with reference to his client's liberty.

We started with the appellate court's unambiguous recognition that certain flaws occurred in the trial leading to these convictions. For our part, given these correct determinations, it is most difficult to understand how that court could still say, with any sense of conclusiveness of law or fact, that an affirmance here was nonetheless proper.

Our view, which clashes mightily with the court's, is that given the meaningful errors credited by the Court of Appeals, as being present, there is absolutely no way (from the fastness of an appellate court bench) the pulsebeat of the trial courtroom could be perceived with sufficient reliability to enable that court (or any court) to correctly determine that even had such errors *not* occurred, the jury's verdict would have nonetheless been the same.

What this suggests is that the court of appeals has simply closed its eyes to the probabilities of courtroom dynamics in this and in other areas of its Opinion. For, the trial court having granted the Motion for Judgment of Acquittal on the Organized Crime count, as it really should have done earlier when this same Motion was made at the close of the State's case, based on the flagrant lack of evidentiary support (*Jackson v. Virginia*, 443 U.S. 307 [1979]); the critical issues that emerged could not turn on whether it was the defense's responsibility to request that the trial judge take the appropriate action with reference to the evidence admitted solely on the basis of the Organized Crime charge. Yet, despite this obvious fact, the court of appeals arbitrarily satisfied itself that the responsibility for corrective action being taken rested ultimately with the defendants themselves to make a request. A significant upshot of the court's point in this regard is that it is proper that Lanci must personally bear the brunt of his counsel's failure to request the action needed to dull the impact of the evidence the jury had no right to consider.

The fact that *no action* was taken by the trial court, who was solely responsible for this evidence even being admitted in the first place (since he failed to heed numerous objections and Motions and failed to grant the Motion for Acquittal at the close of the State's case – as he should have), becomes a most critical circumstance since there is really no realistic way it can be said that the men on trial were not prejudiced by the jury's consideration of this evidence *as substantive proof*. Indeed, given the trial court's belief that the Organized Crime charge had not been made, there was a manifest necessity for the granting of a mistrial. Counsel's failure to request must be regarded as a further instance of *ineffective assistance of counsel*.

For all of these various reasons, certiorari should be granted.

Respectfully submitted,

A. RICHARD VALORE, ESQ.
Of Counsel

JAMES R. WILLIS, ESQ.
*Attorney for Petitioner*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 20th day of April, 1981.

/s/ JAMES R. WILLIS, ESQ.
Attorney for Petitioner

Office-Supreme Court, U.S.
FILED
APR 21 1981
ALEXANDER L. STEVAS,
CLERK

80-1768

No. .....

# In the Supreme Court of the United States

**October Term, 1980**

THOMAS LANCI,
*Petitioner,*

vs.

STATE OF OHIO,
*Respondent.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS CUYAHOGA COUNTY, OHIO

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# APPENDIX A

## Entry of the Ohio Supreme Court Dismissing Appeal

(Dated February 20, 1981)

No. 80-1280

THE SUPREME COURT OF OHIO
The State of Ohio, City of Columbus

STATE OF OHIO,
*Appellee,*

vs.

THOMAS LANCI,
*Appellants.*

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

# APPENDIX B

## Entry of the Ohio Supreme Court Denying Leave to Appeal

(Dated February 20, 1981)

No. 80-1280

THE SUPREME COURT OF THE STATE OF OHIO
The State of Ohio, City of Columbus

STATE OF OHIO,
*Appellee,*

vs.

THOMAS LANCI,
*Appellant.*

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

It is ordered by the Court that this motion is overruled.

## APPENDIX C

**COURT OF APPEALS OF OHIO, EIGHTH DISTRICT**
**County of Cuyahoga**

NO. 39907
39906

STATE OF OHIO — APPEAL FROM

APPELLEE — COMMON PLEAS COURT
-vs- — No. CR-38130

THOMAS LANCI (No. 39907)
KENNETH CIARCIA (No. 39906)
APPELLANTS

**JOURNAL ENTRY AND OPINION**
(Filed September 25, 1980)

CORRIGAN, J:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgement of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This is an appeal by Thomas Lanci and Kenneth Ciarcia, defendants below, from a judgement entered upon the verdict of a jury, which had found each defendant guilty of aggravated murder in connection with the death of Daniel J. "Danny" Greene.

On October 6, 1977, Danny Greene was killed in the parking lot of Brainard Place, Lyndhurst, Ohio, when, as he entered his car, a dynamite bomb, which had been placed in the car parked next to his, was detonated by remote control.

On November 10, 1977, Raymond Ferrito of Erie, Pennsylvania, turned himself in to F.B.I. officials in Pittsburgh, and subsequently confessed to his role in the murder of Greene. Ferrito revealed that, in 1976, he had been solicited by a Cleveland crime syndicate to kill Greene, a rival syndicate leader. In early October of 1977, Ferrito was provided with information, gathered from a tap of Greene's phone line, that Greene was scheduled for a dental appointment at Brainard Place in the afternoon of October 6.

On that date, Ferrito and a Ronald Carabbia met two other individuals, one named "Tony", at Brainard Place to attempt the murder of Greene. Their plan required that Tony and his companion first try to shoot Greene with a high-powered rifle as he entered Brainard Place. If the opportunity for a clear shot did not present itself, Ferrito and Carabbia would attempt to park a rigged car next to Greene's and blow him up as he left Brainard Place.

Tony and his associate were not able to shoot Greene as he entered Brainard Place, so the alternate scheme was employed. As Ferrito and Carabbia watched Greene approach his car to leave, Carabbia electronically detonated the bomb in the car parked next to Greene's. The explosion which ensued caused Greene's death.

From the information supplied to them by Ferrito, the F.B.I. learned that the two men with Ferrito and Carabbia on October 6, 1977 were Louis J. Aratari, aka Tony DeMarco, Tony Rome, and Gino, and Renaldo A. Guiliani, *aka* Victor Guiles and Renaldo A. Guiles. Aratari was arrested on February 27, 1978, and Guiliani or Guiles, on March 1, 1978.

Aratari and Guiles, like Ferrito, confessed to their roles in the killing of Greene. Aratari revealed that, in the summer of 1977, he had been recruited by Thomas Lanci, one of the appellants herein, to participate in an ongoing conspiracy to

murder Danny Greene and other members of the "Irish Gang". Aratari, in turn, recruited his friend, Vic Guiles, a supposed marksman, to assist him in the endeavor.

Initially, Aratari and Guiles, supplied with information, weapons, and transportation from Lanci, his uncle Kenneth Ciarcia, the other appellant herein, and Anthony Liberatore, stalked lesser members of the Irish Gang. In September, 1977, however, they were assigned to work together with Ferrito and Carabbia exclusively in the plot to kill Greene.

On October 6, 1977, they were present with Ferrito and Carabbia at Brainard Place and unsuccessfully attempted to set up a hit on Greene when he arrived for his dental appointment. Aratari and Guiles later witnessed the positioning of the bomb car next to Greene's by Ferrito and Carabbia, but did not remain on the premises to witness the explosion itself.

Acting on the information they received from Aratari and Guiles, F.B.I. agents arrested Lanci and Ciarcia on March 3, 1978. On March 7, 1978, a Cuyahoga County Grand Jury indicted Lanci, Ciarcia, Aratari, Guiles, and Anthony Liberatore on three counts of violating R.C. §§2909.02 (aggravated arson), 2903.01 (aggravated murder), and 2923.04 (engaging in organized crime) in connection with the death of Danny Greene.

Prior to trial, Aratari and Guiles entered into a plea bargaining arrangement with the prosecution. Anthony Liberatore, for reasons not appearing in the record, also was not tried with Lanci and Ciarcia. On June 9, 1978, the lower court granted a State motion to jointly try the appellants with John P. Calandra, Sr., who, in a different indictment, had been charged with similar offenses in connection with the death of Greene.

Trial of the charges against Lanci, Ciarcia, and Calandra commenced on June 13, 1978. A lengthy trial ensued. On August 15, 1978, at the conclusion of the presentation of all of the evidence by the parties, the trial court granted Criminal Rule 29(a) motions by each of the defendants with respect to the third count of their indictments, involving the charge of engaging in organized crime. On August 19, 1978, the remaining charges against each defendant were submitted to the jury.

On August 25, 1978, the jury found defendant Calandra not guilty of the remaining charges against him, but, while finding appellants Lanci and Ciarcia not guilty of aggravated arson, found each guilty of aggravated murder, but not guilty of the specifications associated with that count of the indictment.

In timely appealing from the judgement subsequently entered upon this verdict, appellants have assigned, in this consolidated appeal, ten errors, as follow, for review:

I. The trial court erred in failing to discharge appellants pursuant to Ohio's speedy trial statutes, R.C. §§2945.71 through 2945.73.

II. The defendants were denied guaranteed sixth amendment rights set forth below under enumerations (A), (B) and (C).

(A) The trial court's denial of defendants' request for a bill of particulars was in derogation of defendants' constitutional rights.

(B) The defendants were denied the right to equal protection embodied in the fourteenth amendment.

(C) The trial court erred in charging the jury on an uncharged, unindicted crime in derogation of appellants' sixth amendment rights.

III. Where the trial court, in a multiple defendant murder prosecution which included a number of other serious felony charges, summarily excuses the court reporter and reads the jury a written charge: due process is violated when such action results in the charge not being recorded as is specifically required by statute.

IV. The appellant Lanci suffered a prejudicial spill-over effect from the fact that, at his trial for the substantive offenses for which he was convicted, he was also tried for organized crime–a charge predicated on an unconstitutional statute (*I.E. R.C. of Ohio*, §2923.04).

V. Where proof of the crime for which the accused was acquitted is necessary to sustain a conviction of the crime for which he was convicted, the guilty verdict must be regarded as invalid.

VI. The defendant was denied due process, and otherwise substantially prejudiced, as a direct consequence of the following circumstances, set forth below under the enumerations (A), (B) and (C).

(A) Given the state's argument – that is, that the other crimes and wrongs shown by the evidence being assailed occurred in furtherance of a "conspiracy", the admission of such evidence without appropriate instructions, for such reason, or any other purpose collateral to the substantive charges of aggravated murder and aggravated arson, violated due process.

(B) The improper and indefensible admission of considerable evidence, showing other crimes and wrongs, which evidence did not qualify for admission under the state's similar acts statute (*R.C. of Ohio*, §2945.59), the statute under which such evidence was tendered.

(C) Assuming the evidence referred to above qualified for admission under the above-indicated statute, the admission of such evidence as substantive proof of the charges made in the indictment cannot be justified in law, logic or common sense.

VII. The State having failed to make the sufficient showing of good cause required by *R.C. of Ohio* §2945.20, as to why these appellants and their co-defendant should have been joined for trial; the court erred or abused its discretion, or otherwise facilitated a denial of due process, by consolidating this capital case for trial.

VIII. The trial court committed prejudicial error by allowing the prosecutor to try this cause on the basis of an offense, or offenses, not charged in the indictment (*E.G.*, Conspiracy to commit murder) which rulings had the effect of amending the indictment in violation of due process.

IX. The trial court erred in denying appellants' sixth amendment right to confront witnesses.

X. Due process is denied an accused where the conviction has been obtained upon evidence insufficient as a matter of law.

I.

In Assignment of Error I, appellants contend that the lower court erred in denying their motion to discharge made pursuant to R.C. §2945.73. This contention is without merit.

The record reflects that appellants were brought to trial 102 days following their arrests and that moreover, in light of their pre-trial confinement without bond, were arguably [1] entitled to the triple-count provision of R.C. §2945.71 (D). However, the record further reflects that, prior to the ninetieth day of their pre-trial confinement, appellants filed a number of motions the disposition of which extended the time in which the State was required to bring them to trial. R.C. §2945.72(E). Included among these motions were the following: motion for reassignment, filed on March 9, 1978 and granted on April 7, 1978; motion for bail, in which appellants requested an oral hearing and the production of several State witnesses held in federal custody, filed on March 9, 1978, and granted on June 6, 1978; motion to dismiss the indictment, filed on May 16, 1978, and denied on June 13, 1978; and a motion in limine, filed on May 31, 1978, and denied on June 12 and 13, 1978.

[1] There is some indication within the record that appellants were not being held in custody prior to their trial below solely on the pending charges, but were also being held on related federal charges, which would have precluded them for entitlement to R.C. S2945.71(D)'s triple-count provision. *See State v. MacDonald* (1978), 48 Ohio St. 2d 66.

We thus conclude that, although appellants were brought to trial 12 days following the expiration of the 90 day period established by R.C. §2945.71(D), this delay in bringing them to trial was justifiable under the provision of R.C. §2945.72(E). Accordingly, Assignment of Error I is overruled.

II(A)

In two of the three arguments which they pose in Assignment of Error II, appellants assert that their right under the Sixth Amendment to the United States Constitution to be informed of the nature and cause of the accusations against them was violated in the proceeding below. More specifically, appellants submit that the grand jury's indictment, even when supplemented by the information contained in the State's bill of particulars, insufficiently apprised them that the State intended to proceed against each of them as accomplices in the successful conspiracy to murder Danny Greene. As a result, appellants claim they were further prejudiced when the lower court subsequently instructed the jury to determine whether appellants had aided and abetted the aggravated arson and aggravated murder of Danny Greene. We find no merit in these arguments.

The Sixth Amendment right to be informed of the nature and cause of an accusation requires that a criminal defendant be provided with information concerning all of the elements of the offense charged, and that, where statutory language is employed, generic terms be translated into specifics of the alleged criminal act, so that the defendant may understand with reasonable certainty the nature of the charge and be able to prepare his defense. *See Hamling v. United States* (1974), 418 U.S. 87; and *Russell v. United States* (1962), 369 U.S. 749. We conclude, upon reviewing the indictment and bill of particulars, and the evidence produced by the State at trial, that this constitutional requirement was satisfied below.

In each count of the indictment, the State employed the statutory language associated with the offenses charged, and translated, where necessary, generic terms into the specifics of the alleged criminal acts involved. The language of the indictment sufficiently apprised appellants that they were charged with, and would have to defend against, the offenses of aggravated arson, aggravated murder, and engaging in organized crime, all in connection with the death, on October 6, 1977, of Daniel J. Greene.

Appellants, however, assert that, from a reading of this indictment, it was not clear whether they were being charged as principals or accomplices to the offenses alleged. Even assuming that this omission rendered the indictment constitutionally deficient,[2] the deficiency was corrected by the State's bill of particulars. *See State v. Lewis* (1970), 21 Ohio St. 2d 203.

This bill of particulars, in pertinent part, stated that:

> "...the State will prove that Thomas Lanci, Anthony Liberatore, Kenneth Ciarcia, Louis Aratari, Renaldo Guiliani, James Frattiano, Alfred Calabrese, Ronald Carabbia, James Licavoli, John Calandra, Angelo Lonardo, Thomas Sinto, Raymond Ferrito, and Carmen Marconi did knowingly and purposely with the purpose to establish or maintain a criminal syndicate or to facilitate its activities conspire with each other to commit an offense of violence, the Murder of Daniel J. Greene on October 6, 1977, and that such murder was caused by said defendants by means of fire or explosion by co-defendants for hire. The culmination of the conspiracy occurred in the afternoon hours of October 6, 1977 at Brainard and Cedar Roads with the killing of Danny Greene."

[2] In Ohio, an accomplice to the commission of a criminal offense is subject to the same prosecution and punishment as the principal offender, and may be charged in the language of the principal offense. R.C. §2923.03(F). Therefore, one charged with violating a provision of the Ohio Criminal Code is arguably put on fair notice that the State may proceed against him at trial as either an accomplice or principal, and thus should prepare his defense to respond to either theory of culpability. Accordingly, it is debatable whether an indictment in a state criminal proceeding, which fails to indicate whether the defendant is being charged as a principal or as an accomplice, may form the basis of a Sixth Amendment violation.

This language sufficiently apprised appellants that the State intended to proceed against them at trial as accomplices to the murder of Danny Greene. As the transcript of the trial reveals, this was exactly how the State subsequently proceeded with its evidence against appellants. Therefore, we conclude that appellants' right to be informed of the nature and cause of the accusation against them was not violated below.

In light of this conclusion, we, of necessity, further conclude that it was not error to instruct the jury on aiding and abetting in connection with the charged offenses of aggravated arson and aggravated murder in connection with the death of Danny Greene. Accordingly, we find no merit in either of the Sixth Amendment arguments posed by appellants in Assignment of Error II.

II(B)

In their remaining argument within Assignment of Error II, appellants contend that, by prosecuting them under R.C. S2923.03(A) (3), the State violated their right to equal protection of the laws as guaranteed under the Fourteenth Amendment to the United States Constitution. There is no merit in this argument.

Appellants assert that the Ohio Legislature in enacting both R.C. §§2923.01 and 2923.03(A) (3), unconstitutionally delegated to prosecutors' unfettered discretion to subject criminal defendants, charged with identical acts of conspiracy, to different maximum penalties upon conviction. We need not determine whether, as argued, R.C. §§2923.01 and 2923.03 (A) (3) proscribe identical acts, nor need we subject appellants' argument to a detailed equal protection analysis. Absent a showing of discrimination against a class of individuals or that a fundamental interest has been affected, the imposition of different penalties under different criminal statutes for identical acts does not offend the equal protection clause of the Fourteenth Amendment. *United States v. Batchelder* (1979), 99 S. Ct. 2198. *Cf. Skinner v. Oklahoma* (1942), 316 U.S. 535. No such showing by appellants was made below.

Accordingly, we find no merit in this argument, and, as a result, overrule Assignemnt of Error II.

III.

In Assignment of Error III, appellants contend that due process was violated below when the trial court excused the court reporter from making a contemporaneous recording of the written charge the court delivered to the jury. We find this assignment to be without merit.

The record of the proceeding below reveals that, after soliciting proposed instructions from all parties to the trial, the lower court assembled in typewritten form instructions for the jury. At the proper time, the court, reading from these prepared instructions, delivered its charge to the jury. Later, presumably, a copy of this charge was given to the court reporter and transcribed as part of the record. We have no evidence of record before us which demonstrates, nor in fact do appellants even assert, that the charge transcribed into the record was not identical to that given to the jury.

We find no violation of due process to have resulted from the foregoing procedure. Due process, in this regard, merely requires that, where appellate review is an integral part of a State's trial system, a criminal defendant has access to a report of the trial proceeding of "sufficient completeness" to enable a reviewing court to adjudicate the claims he makes in an appeal from his conviction. *See Mayer v. City of Chicago* (1971), 404 U.S. 189; and *Griffin v. Illinois* (1955), 351 U.S. 12. Here, as we have previously noted, there is no assertion by appellants that the record of the trial below, or, more specifically, of the charge given to the jury, was not of sufficient completeness to afford appellants an adequate review in this court.

Appellants additionally argue, however, that this procedure utilized by the trial court violated the requirements of Criminal Rule 22. Even assuming that there is merit in this argument, the error we might thus recognize would clearly have been harmless. *See* Crim. Rule 52(A).

For the foregoing reasons, Assignment of Error III is overruled.

IV

In Assignment of Error IV, appellants contend that they were prejudiced by being tried below on a charge derived from an unconstitutional statute, *viz.*, R.C. §2923.04. We find no cognizable merit in this assignment.

The record reflects that appellants indeed were tried below on a charge of violating R.C. §2923.04 (engaging in organized crime). This statute, subsequent to appellants' trial, was declared unconstitutional by the Ohio Supreme Court in *State v. Young* (1980), 62 Ohio St. 2d 370. While this charge of engaging in organized crime, the record reflects, was dismissed below on a motion for acquittal at the conclusion of the presentation of appellants' defense, appellants submit here that they nevertheless were prejudiced by a spill-over effect of this charge onto the remaining charges which were submitted to the jury.

Even assuming, as appellants submit, that the jury improperly considered in its deliberations evidence probative only of the dismissed count, we cannot agree that reversals of appellants' convictions are, as a result, required. Appellants failed below to request that the trial court eliminate this potential for prejudice by instructing the jury to not consider evidence probative of the organized crime count only. Therefore, appellants waived this possible irregularity in the proceeding below. *See* Crim. Rule 30; and *State v. Lane* (1976), 49 Ohio St. 2d 77.

Moreover, we conclude that this omission in the trial court's instructions to the jury did not amount to plain error. *See* Crim. Rule 52(B); and *State v. Long* (1978), 53 Ohio St. 2d 91. The evidence of appellants' guilt as accomplices in the murder of Danny Greene was substantial. *See* discussion, *infra*, Part X. Further, the dismissed count of engaging in organized crime was related to the remaining two counts submitted to the jury, and much, if not all, of the evidence, admitted as probative of the organized crime count, was also probative of the aggravated arson and aggravated murder counts. *See* discussion, *infra*, Part VI. Additionally, the record reveals that appellants' trial counsel, working together with State's counsel, were able to agree upon removing from the jury's inspection many of the State's exhibits which appellants contended were related only to the dismissed count. (Tr. 7212-14; 7220-22; 7225-26; 7683-97) Finally, the court did instruct the jury not to consider the dismissed organized crime count. (Tr. 7224) For these reasons, we do not find the court's failure to have

instructed the jury not to consider any testimonial evidence probative of the dismissed count only, even if error, to have resulted in a "manifest miscarriage of justice". *State v. Long, supra.*

Accordingly, Assignment of Error IV is overruled.

V.

In Assignment of Error V, appellants submit that their convictions below of aggravated murder are invalid because of inconsistency both within that count of the indictment itself and between that count and another count within the indictment. Specifically, appellants argue, first, that the jury could not consistently have acquitted them of a charge of aggravated arson, and at the same time have found them guilty of one of aggravated murder, where the aggravating circumstance in the murder charge was the aggravated arson of which they had been acquitted. Second, appellants argue that the jury was inconsistent in finding them guilty of the aggravated murder of Danny Greene "while committing or attempting to commit...Aggravated Arson", but not guilty of either of the aggravated circumstances, *i.e.* "aggravated arson" and "for hire", specified within that count of the indictment. We find these arguments to have no legal merit.

It has long been the law within this State that there need not be consistency between verdicts on separate counts of a criminal indictment. *See State v. Adams* (1978), 53 Ohio St. 2d 223; *State v. McNicol* (1944), 143 Ohio St. 39; *Browning v. State* (1929), 120 Ohio St. 62; and *Griffin v. State* (1868), 18 Ohio St. 438. In so holding, Ohio courts have followed what appears to be the majority rule. *See* Annot., 18 A.L.R. 3d 259 (1968).

While logic may, at first blush, seem to have taken a back seat in the formulation of this rule, there is nevertheless good reason for its existence. Perhaps best expressive of this reasoning is the following statement by Justice Holmes in *Dunn v. United States* (1932), 284 U.S. 390, 393-94:

"As was said in Steckler v. United States (C.C.A. 2d) 7F. (2d) 59, 60:

" 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'

"Compare Horning v. District of Columbia, 254 U.S. 135, 65 L. ed. 185, 41 S. Ct. 53.

"That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."

Thus, matters where a jury has been properly instructed and where the finding of guilty they return on a count or counts of the indictment is supported by sufficient evidence, the majority rule concludes that inconsistency between these findings and those on related counts, where an acquittal instead is returned, is not grounds for the reversal of a conviction on appeal. Thus, applied here, perhaps logic, but neither appellants' substantive rights nor justice, was offended by the jury's verdict below. Accordingly, we find no cognizable merit in appellants' argument that the inconsistency between the jury's verdicts on the related counts of the indictment rendered their convictions invalid.

Moreover, we find no internal inconsistency within the verdict finding appellants guilty of aggravated murder, but not guilty of either of the attendant specifications. A verdict of guilty on a count of aggravated murder is not in any manner dependent upon findings which the jury may subsequently deliver upon specifications included within that count pursuant to R.C. §2929.04. *See State v. Perryman* (1976), 49 Ohio St. 2d 14, 26. Thus, where a jury finds a defendant guilty of

aggravated murder, but acquits him of a specification which enumerates an aggravating circumstance identical to that within the charge itself, the verdict itself is not rendered invalid as a result. *State v. Perryman, supra,* syllabus No. 3. Therefore, we find no merit in this second argument advanced herein by appellants.

Accordingly finding no merit in either of appellants' arguments, we overrule Assignment of Error V.

VI

In Assignment of Error VI, appellants, in a three-pronged argument, submit that the trial court erred in admitting evidence of their involvement in other crimes of which they were not charged, *viz.*, the conspiracy and attempts to murder other members of the Irish Gang, and the theft of F.B.I. documents. We find no merit in this assignment of error.

Our review of the record below reveals that evidence of these crimes was admissible under R.C. §2945.59 to prove appellants' "scheme, plan or system" in the conspiracy to murder Danny Greene. *See State v. Lytle* (1976), 48 Ohio St. 2d 391; and *State v. Curry* (1975), 43 Ohio St. 2d 66. While appellants were entitled to an instruction on the limited purpose for which this evidence might be considered by the jury, none was requested by appellants and therefore they waived any error in the court's omission to so instruct. *See* Crim. Rule 30; and *State v. Lane, supra.* Moreover, we do not find that the failure to so instruct rendered appellants' convictions a manifest miscarriage of justice, thereby causing the omission to rise to the level of plain error. *See* Crim. Rule 52(B), and *State v. Long, supra. Also see* our discussion of a similar issue in Part IV of this opinion, *supra.*

Accordingly, Assignment of Error VI is overruled.

VII.

In Assignment of Error VII, appellants contend that, in violation of Criminal Rule 14, the trial court granted the State's motion to jointly try them and their co-defendant below, John Calandra, without "good cause" having first been shown. We find no merit in this assignment of error.

Whether the State has met its burden of demonstrating "good cause" to jointly try defendants to a capital charge is a matter committed to the sound discretion of the trial court. *See State v. Abbott* (1949), 152 Ohio St. 228, 238-39; and *State v. Fields* (1971), 29 Ohio App. 2d 154.

In the case at bar, the State below advanced the following seven grounds in support of its motion for joint trial:

> "1. All of the defendants acted in concert, in furtherance of a common goal or design, the conspired killing of Daniel J. Greene.
>
> "2. The jury in a joint trial would be better able to weigh the testimony and would be in a better position to render justice in this case.
>
> "3. The testimony and exhibits required would be identical as to the case presented as to each defendant.
>
> "4. The crime charged in a conspiracy requiring proof as to all the defendants and their position in the common plan, thus, the jury could better appraise the part of each in a joint trial.
>
> "5. Only a joint trial would result in a fair, intelligent and complete submission of all the evidence, and separate trials would cause great cost to the State, the witnesses and the jurors.
>
> "6. The State does not intend to use any out-of-court statements by any defendant on trial made to law enforcement officers during custodial interrogation.
>
> "7. The State intends to use direct testimony of witnesses who are in fear of death or great bodily harm, including two co-defendants."

In related proceeding, *State v. Cisternino and Carabbia (July 10, 1980), unreported,* Ohio Eighth District Court of Appeals, Nos. 39894 and 39916, we observed that the first, second and seventh grounds above cited have been recognized as sufficient to establish good cause to join. Therefore, we conclude here that the trial court in the proceeding below did not abuse its discretion in granting the State's motion for joint trial. Accordingly, Assignment of Error VII is overruled.

VIII

In Assignment of Error VIII, appellants contend that their right to due process was violated below because they were tried on an unindicted charge, *viz.,* conspiracy to commit murder. *See Watson v. Jago* (6th Cir., 1977), 558 F. 2d 330. We disagree.

Consistent with our previous discussion of appellants' Assignment of Error II, we observe that appellants were tried below, not for the offense of conspiracy to murder Danny Greene, but as accomplices to that murder.

Under R.C. §2923.03(A) (3), culpability as an accomplice may be proven by establishing the defendants' participation in a conspiracy which precedes and which might reasonably be expected to result in the principal offense charged. *See State v. Doty* (1916), 94 Ohio St. 258; and *Goins v. State* (1889), 46 Ohio St. 457. Thus, in the proceeding below, the State produced evidence of the conspiracy to murder Danny Greene, not in an effort to have appellants tried on this unindicted charge, but rather to establish their guilt as accomplices to the murder itself.

In such a prosecution of the principal offense, the State is entitled to the evidentiary advantages of conspiracy law, so long as it demonstrates a *prima facie* case of the existence of the conspiracy it alleges. *Goins v. State, supra.* Our review of the transcript of the trial below leads us to conclude that the State clearly met this burden and thus was entitled to these evidentiary advantages. Accordingly, we find no merit in appellants' argument that, in violation of due process, they were tried below on the unindicted charge of conspiracy to commit murder. Assignment of Error VIII is overruled.

## IX.

In Assignment of Error IX, appellants contend that their right, under the Sixth Amendment to the United States Constitution, to be confronted with the witnesses against them was violated below. In support of this contention, they advance the following arguments: first, defense counsel, in their cross-examinations of federally protected witnesses Raymond Ferrito, Louis Aratari, Victor Guiles, and Geraldine Rabinowitz, were "not permitted to elicit testimony relating to exculpatory statements, bias or prejudice, or the circumstances surrounding the arrests and conversations of said witnesses with the Federal Bureau of Investigation"; second, at a pre-trial hearing held below on a defense motion to suppress, the testimony of the F.B.I. agents, who appeared as witnesses for the State, "was under the control of the ever present attorneys from the United States Department of Justice Strike Force"; and third, defense counsel were denied access to alleged purloined F.B.I. documents, with neither a government showing of the need for their confidentiality nor an *in camera* inspection of the documents by the trial court. We find no merit in these arguments.

Certainly, the Sixth Amendment right to confront witnesses entails the trial right to subject adverse witnesses to a full and effective cross-examination. *See California v. Green (1970), 399 U.S. 149.* A review of the transcript of the trial below, however, leads us to conclude that this right of appellants was in no manner infringed.

First, contrary to appellants' assertion, we find no instances in the record of the cross- and recross-examinations of Ferrito, Aratari, Guiles, and Rabinowitz by appellants' trial counsel, in which the trial court prevented defense counsel from eliciting "testimony relating to exculpatory statements, bias or prejudice, or the circumstances surrounding the arrests and conversations of said witnesses with the Federal Bureau of Investigation."

Second, we find no indication in the record of the pre-trial hearing held below that the presence of a department of Justice Strike Force attorney, as legal advisor to the testifying F.B.I.

agents, in any way prevented appellants' trial counsel from fully and effectively cross-examining these agents on matters within the scope of their authority to testify. *See*, generally, *United States, ex rel. Touhy v. Ragen* (1951), 340 U.S. 462.

Finally, while the record below reveals that appellants' trial counsel were denied access to excised portions of the alleged stolen F.B.I. documents, this denial did not result in a violation of their right to fully and effectively cross-examine state witness Rabinowitz, the former government employee charged with the theft of the documents.

Contrary to appellants' assertion, an adequate showing was made below by the government of the need for confidentiality with respect to the excised material. F.B.I. agent Michael Kahoe testified that the material excised from the documents concerned the identity of informants involved in ongoing F.B.I. investigations. (Tr. 3571) A government's privilege to withhold the identity of its informants is well established. *See Scher v. United States* (1938), 305 U.S. 251; and VIII Wigmore or Evidence 761, §2374 (McNaughton rev. 1961).

Moreover, and also contrary to appellants' assertion, the record discloses that the trial court did properly conduct an *in camera* inspection of the F.B.I. documents to determine whether the defendants' need for access to the excised portions outweighed the government's need for confidentiality. (TR 3806) *See United States v. Nixon* (1974), 418 U.S. 683; and *United States v. Reynolds* (1953), 345 U.S. 1. The trial court concluded that appellants did not need access to the excised material in order to fully and effectively cross-examine witness Rabinowitz. Appellants have not here challenged that conclusion as an abuse by the lower court of its discretion in this matter.

Finding no merit to exist, therefore, in any of the three arguments posed, we overrule appellants' Assignment of Error IX.

## X.

In their final assignment of error, appellants contend that their right to due process was infringed by the insufficiency of the evidence below upon which their convictions of aggravated murder rested. In this regard, due process requires that the evidence upon which a conviction rests be sufficient to justify a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307; *In re Winship* (1970), 397 U.S. 358. We conclude that, when measured against this standard, appellants' convictions do not offend due process.

Appellants were found guilty below of complicity in the aggravated murder of Danny Greene on October 6, 1977. The State's case revolved about the testimony of appellant's co-accomplices, Raymond Ferrito, Louis Aratari, and Victor Guiles. Through their testimony, the State produced evidence of each and every material element of the offense charged.

Raymond Ferrito, who acted with Ronald Carabbia and "Butchie" Cisternino in assembling and detonating by remote control the dynamite bomb which caused Greene's death, testified concerning the conspiracy to kill Greene. He revealed that, in 1976, he had been hired by a Cleveland crime syndicate to kill Danny Greene. (Tr. 1312) After a period of inactivity and several unsuccessful attempts to set up a hit on Greene, Ferrito was informed by John Calandra, a member of the syndicate, in late August or early September 1977, that two associates of Anthony Liberatore had been assigned to aid him in the plot to kill Greene. (Tr. 1355) Thereafter, he met with these two individuals, Louis Aratari and Victor Guiles, on several occations prior to the murder of Greene. (Tr. 1359-63)

On October 6, 1977, he and Carabbia met Aratari and Guiles at Brainard Place, where Greene was scheduled for a dental appointment that afternoon. (Tr. 1398) Ferrito observed a rifle with a scope in Aratari's car. (Tr. 1399) Aratari and Guiles then left to position their car near the entrance to the building. Thereafter, Ferrito observed Greene arrive and enter the building. Aratari and Guiles, a few minutes later, returned to Ferrito's car and explained that they had missed their opportunity to shoot Greene when he arrived. (Tr. 1399)

Ferrito then told Aratari and Guiles to leave, and he and Carabbia parked a car, in which they had implanted a dynamite bomb, next to Greene's car. (Tr. 1400) When Greene later exited the building and returned to his parked car, Carabbia detonated the bomb, killing Greene. (Tr. 1400)

Louis Aratari testified that he had been recruited by appellant Lanci to kill members of the "Irish Gang". (Tr. 2103-05) Aratari, in turn, recruited his friend, Victor Guiles, to help him. (Tr. 2109) After spending some time tracking lesser members of the gang, Aratari and Guiles were assigned by Lanci to help another team of individuals who were attempting to kill Danny Greene. (Tr. 2133-34) After several meetings with the other team, composed of Ferrito, Carabbia and Cisternino, Aratari and Guiles again met Ferrito and Carabbia on October 6, 1977, at Brainard Place to carry out their plan to kill Danny Greene when he arrived for his dental appointment. (Tr. 2138-53; 2164-69; 2217-29) Aratari and Guiles failed in their effort to shoot Greene when he arrived, and were subsequently told by Ferrito and Carabbia to leave the area. (Tr. 2233-34) Before leaving the scene, Aratari saw Ferrito moving the bomb car into position next to Greene's parked car. (Tr. 2236-39) Aratari later returned alone to Brainard Place and observed the results of the explosion which had killed Greene. (Tr. 2240)

Aratari further testified to the roles appellants Lanci and Ciarcia performed in the conspiracy to kill Greene. He testified that appellant Lanci supplied him and Guiles with information on Greene's whereabouts (Tr. 2174-77), with the .357 magnum pistol and the rifle they carried on October 6 (Tr. 2115, 2194-99, 2205-08), with ammunition (Tr. 2201-02), and partially paid him for the hit on Greene. (Tr. 2265-67) Aratari revealed that Ciarcia, also a party to the conspiracy, supplied him with a car to use on October 6 (Tr. 2169-70, 2181-88, 2222-23), and provided him thereafter with partial payment for the killing. (Tr. 2254-57)

Victor Guiles, Aratari's associate, also testified for the State, and substantially corroborated Aratari's version of the conspiracy to murder Danny Greene. (Tr. 2955-3047, 3071-72)

In addition to the testimony of Ferrito, Aratari, and Guiles, the State produced a substantial amount of testimonial and documentary evidence, much of which was gathered by the F.B.I., which corroborated, to a significant degree, the testimony of these three witnesses.

Upon carefully reviewing the totality of the evidence produced below by the State, we conclude that the standard for due process, as recently enunciated in *Jackson v. Virginia, supra*, was attained, at appellants' trial. The State's case, in large part, depended upon the credibility which the jury chose to attach to the testimony of Ferrito, Aratari and Guiles. While appellants' trial counsel, in very competent fashion, zealously sought to discredit the testimony of these witnesses, the testimony of each concerning the conspiracy to kill Greene remained internally consistent and substantially in accord with that supplied by the other two. Moreover, as above indicated, the State produced a voluminous amount of testimonial and documentary evidence, which significantly corroborated the version of the conspiracy to kill Danny Greene as related to the jury by the three major witnesses.

In this State, it is well established that convictions are supported by sufficient evidence where the only challenge to that evidence is directed to the credibility of the witness supplying it. *See, e.g., State v. DeHass* (1967), 10 Ohio St. 2d 230. We hold here, similarly, that due process is not offended where a conviction depends upon the credibility attached to accomplice testimony, which is substantially corroborated to a significant degree. *Cf.* R.C. §2923.03(D) and *State v. Meyers* (1978), 53 Ohio St. 2d 74. In the trial proceeding below, a rational trier of fact, presented with the accomplice testimony of Ferrito, Aratari and Guiles, which was substantially corroborated to a significant degree by other evidence produced by the State, could have fairly found appellants guilty, beyond a reasonable doubt, of complicity in the aggravated murder of Danny Greene. Therefore, we conclude that appellants' convictions below were supported by sufficient evidence to satisfy the requirements of due process.

We finally note that appellants have argued in their brief that the evidence below showed that, prior to Greene's death, Aratari and Guiles abandoned the conspiracy to kill Greene when they were told by Ferrito and Carabbia to leave Brainard Place. This argument is devoid of merit.

The evidence clearly reveals that Aratari and Guiles, one of the two "teams" which attempted to kill Greene on October 6, 1977, departed Brainard Place, at the direction of the other team, only after their particular method of attempting to kill Greene, by shooting him with a high-powered rifle as he entered the building for his dental appointment, failed. There is nothing in the record which supports appellants' assertion that these two accomplices thereafter formulated any intent to abandon the conspiracy prior to its conclusion. To the contrary, following Greene's death, Guiles reported to appellant Ciarcia the fact of the killing and Aratari and he were paid by Ciarcia and appellant Lanci for their efforts in this regard.

On the basis of the foregoing, appellants' Assignment of Error X is overruled.

Judgement affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed. The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgement into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRENZLER, C.J.,
JACKSON, J., CONCUR.

/s/JOHN V. CORRIGAN
Judge

For plaintiff appellee: John T. Corrigan
For defendant appellant, Kenneth Ciarcia: Jonathan H. Soucek
For defendant appellant, Thomas Lanci: A. Richard Valore, James R. Willis and Stephen Walker

## APPENDIX D

### IN THE COURT OF COMMON PLEAS

**STATE OF OHIO,** May Term, 1978
Cuyahoga County To-wit: August 25, 1978
No. CR-38130

STATE OF OHIO Plaintiff
vs
Thomas J. Lanci Defendant
INDICTMENT: Aggravated Arson w/ct Aggravated Murder w/specs. w/ct. Engage in Org. Crime

### JOURNAL ENTRY

(Filed September 6, 1978)

This day again comes the Prosecuting Attorney on behalf of the State and defendant, Thomas J. Lanci was brought into Court, represented by counsel.

Now comes the Jury, conducted into Court by the Bailiff and returned the following verdicts in writing, to-wit: "We, the Jury being duly impaneled and sworn, do find the defendant, Thomas J. Lanci, Not Guilty of Aggravated Arson, as charged in the first count of the indictment." and "We, the Jury do find the defendant, Thomas J. Lanci, Guilty of Aggravated Murder, R.C. 2903.01, but we further find the defendant, Thomas J. Lanci, Not Guilty of Specifications one (1) and two (2), under the second count of the indictment." (Third count was dismissed."

Thereupon, the Court informed the defendant of the verdict of the Jury.

Whereupon, the Court inquired of the defendant if he had anything to say why judgment should not be pronounced against him and he having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced.

It is therefore, ordered and adjudged by the Court that defendant, Thomas J. Lanci be imprisoned and confined in the Columbus Correctional Facility, Columbus, Ohio, to a term of LIFE, according to law and he is to pay the costs of this prosecution for which execution is awarded.

Execution of sentence Stayed, pending Appeal.

Appeal Bond set at $250,000.00

Norman A. Fuerst, Judge
va 8/30
n-8-29

# APPENDIX E

## CONSTITUTION OF THE UNITED STATES

*Amendment V [1791]:*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Amendment VI [1791]:*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Amendment XIV [1868]:*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Ohio Revised Code:**

*§2923.01 Conspiracy:*

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, trafficking in drugs, theft of drugs, or illegal processing of drug documents shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any such offense;

(2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.

(B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by him or a person with whom he conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of such character as to manifest a purpose on the part of the actor that the object of the conspiracy should be completed.

(C) When the offender knows or has reasonable cause to believe that a person with whom he conspires has also conspired or is conspiring with another to commit the same offense, then the offender is guilty of conspiring with such other person, even though his identity may be unknown to the offender.

(D) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the conspiracy was impossible under the circumstances.

(E) A conspiracy terminates when the offense or offenses which are its objects are committed, or when it is abandoned by all conspirators. In the absence of abandonment, it is no

defense to a charge under this section that no offense which was the object of the conspiracy was committed.

(F) A person who conspires to commit more than one offense is guilty of only one conspiracy, when such offenses are the object of the same agreement or continuous conspiratorial relationship.

(G) When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

(H) No person shall be convicted of conspiracy upon the testimony of a person with whom he conspired, unsupported by other evidence.

(I) The following are affirmative defenses to a charge of conspiracy:

(1) After conspiring to commit an offense, the actor thwarted the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(2) After conspiring to commit an offense, the actor abandoned the conspiracy prior to the commission of or attempt to commit any offense which was the object of the conspiracy, either by advising all other conspirators of his abandonment, or by informing any law enforcement authority of the existence of the conspiracy and of his participation therein.

(J) Whoever violates this section is guilty of conspiracy, which is:

(1) A felony of the first degree, when one of the objects of the conspiracy is aggravated murder or murder;

(2) A felony of the next lesser degree than the most serious offense which is the object of the conspiracy, when the most serious offense which is the object of the conspiracy is a felony of the first, second, or third degree;

(3) A misdemeanor of the first degree, when the most serious offense which is the object of the conspiracy is a felony of the fourth degree.

(K) This section does not define a separate conspiracy offense or penalty where conspiracy is defined as an offense by one or more sections of the Revised Code, other than this section. In such case, however:

(1) With respect to the offense specified as the object of the conspiracy in such other section or sections, division (A) of this section defines the voluntary act or acts and culpable mental state necessary to constitute the conspiracy;

(2) Divisions (B) to (I) of this section are incorporated by reference in the conspiracy offense defined by such other section or sections of the Revised Code.

*§2923.04 Engaging in Organized Crime:*

(A) No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:

(1) Organize or participate in organizing a criminal syndicate or any of its activities;

(2) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;

(3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;

(4) Furnish legal, accounting, or other managerial services to a criminal syndicate;

(5) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

(6) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of violence;

(7) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of section 2921.02 of the Revised Code.

(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.

(C) As used in this section, "criminal syndicate" means five or more persons collaborating to promote or engage in any of the following on a continuing basis:

(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code;

(2) Compelling or promoting prostitution, or procuring in violation of section 2907.21, 2907.22, or 2907.23 of the Revised Code;

(3) Any theft offense as defined in section 2913.01 of the Revised Code;

(4) Any gambling offense as defined in section 2915.01 of the Revised Code;

(5) Illegal trafficking in drugs of abuse, in intoxicating or spirituous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

(6) Lending at usurious interest, and enforcing repayment by illegal means;

(7) Any offense, for the purpose of gain;

(D) A criminal syndicate retains its character as such even though one or more of its members does not know the identity of one or more other members, and even though its membership changes from time to time.

*§2945.20 Separate trial for capital offense. (GC § 13443-3)*

When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately. The court, for good cause shown on application therefor by the prosecuting attorney or one or more of the defendants, may order said defendants to be tried jointly.

*§2945.59 Proof of defendant's motive. (GC § 13444-19)*

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant' scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

*Rule 29 Motion for Acquittal*

(A) Motion for judgment of acquittal

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion

If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

*Rule 52*

(A) Harmless Error

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain Error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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No. 80-1768

# In the Supreme Court of the United States

**October Term, 1980**

THOMAS LANCI,
*Petitioner,*

vs.

THE STATE OF OHIO,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

## BRIEF OF RESPONDENT IN OPPOSITION

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## COUNTER QUESTIONS OF LAW

1. The trial court's dismissal of one count of a multiple count indictment inures to a petitioner's benefit. Where the Court instructs a jury not to consider such a dismissed count, the petitioner is not prejudiced by his failure to request specific instructions in relation thereto.

2. Consistency between the verdicts on the separate counts of an indictment is unnecessary where petitioner is convicted of one count, but acquitted on others.

3. The petitioner's failure to request limiting instructions to the introduction of certain evidence constitutes a waiver of any error in the Court's omission to so instruct.

4. The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and that was not considered or decided by that Court.

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ON PETITION FOR A WRIT OF CERTIORARI
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## BRIEF OF RESPONDENT IN OPPOSITION

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

## OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed the conviction. The Supreme Court of Ohio sua sponte dismissed the appeal for the reason that no substantial constitutional question existed therein.

The Ohio Courts decided this case in accordance with the statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is, therefore, presented by the petition for certiorari.

## STATEMENT OF THE CASE

On March 7, 1978, Thomas Lanci and Kenneth Ciarcia were indicted along with Louis J. Aratari, Renaldo Guiliani, aka Ronald Arthur Guiles and Anthony Liberatore on a three count indictment. The indictment charged all of the defendants with aggravated arson, Ohio Revised Code, Section 2929.02, by substantial risk of physical harm to Daniel J. Greene; aggravated murder, Ohio Revised Code, Section 2903.01, with specifications of the death of Daniel J. Greene; and engaging in organized crime, Ohio Revised Code, Section 2923.04, upon arraignment of the defendants Lanci and Ciarcia entered pleas of not guilty.

A hearing on the State's motion to consolidate the trial of John Calandra, indicted under a separate indictment for the same charges, with the defendants Lanci and Ciarcia, commenced on May 31, 1978. The motion to consolidate was granted. Immediately thereafter, numerous defense motions were heard and decided by the Court prior to jury selection which began on June 14, 1978. At the conclusion of the State's case a motion for judgment of acquittal as to the third count of the indictment was granted as to all three defendants. On August 25, 1978, the jury returned its verdict finding defendants Lanci and Ciarcia guilty of aggravated murder, as charged in the second count of the indictment, and not guilty of aggravated arson as charged in the first count of the indictment. The jury found the defendant John Calandra not

guilty of all counts. The defendants Lanci and Ciarcia were then sentenced as appears on record.

The petitioner Thomas Lanci then appealed to the Court of Appeals for the Eighth Judicial District of Ohio. The Court of Appeals upheld the conviction of Thomas Lanci. Subsequently, the Supreme Court of the State of Ohio dismissed the appeal to that Court for the reason that no substantial constitutional question existed therein.

## STATEMENT OF FACTS

The evidence did show that the following persons at one time or another were involved in the conspiracy to kill John Nardi, Danny Greene and his associates: James Fratianno, Raymond Ferritto, Tony Delsanter, James Licavoli, also known as Jack White, Ronald Carabbia, John Calandra, Thomas Lanci, Kenneth Ciarcia, Anthony Liberatore, Alfred Calabrese, Tom Sinito, Angelo Lonardo, Pasquale Cisternino, Louis Aratari, also known as Tony Aratari, or Tony DeMarco, and Ronald Guiles, also known as Renaldo Guiliani.

Raymond Ferritto, who previously pled guilty to the murder of Daniel Greene, and who had turned State's evidence, testified that sometime after the death of John Scalish in May of 1976, he and a longtime friend and associate, James Fratianno, who resided in California, met with each other in Warren, Ohio. Fratianno discussed in detail with Ferritto the problems of the Cleveland family of organized crime, the problems they were having in controlling the town, and the fight that the Cleveland organization, and James Licavoli, also known as Jack White, was having with the John Nardi—Daniel Greene group.

Ferritto met with Delsanter, who said that Nardi and Greene were trying to muscle in on some of the gambling activities and they would have to be killed (R. 1314). About three weeks later, he again met in Warren, Ohio, with Delsanter, Carabbia, Cisternino and Licavoli and again discussed the killing of Nardi and Greene. In the Spring of 1977, Ferritto met with John Calandra, Carabbia, Cisternino, again to discuss the killings.

Ferritto was told he would receive a lump-sum payment, or that he would be taken to Detroit and made a member of the organization called "Our Thing" (R. 1319). Also, if he were made a member of the organization that he would get 25 percent of the proceeds of organized crime in the Youngstown—Warren area (R. 1367).

Ferritto subsequently learned of at least two attempts on Nardi's life by gunfire and one attempt to bomb the car of Nardi and Greene at Hopkins Airport. John Nardi was then killed by a bomb blast on May 17, 1977.

In May of 1977, Cisternino and Calabrese visited Ferritto in Erie, Pennsylvania, when they gave him a 1973 Plymouth automobile, that Ferritto subsequently obtained a Pennsylvania title for, under the fictitious name of Guy Mitchell. This car was later identified as being at the bombing scene of Greene's death.

Louis Aratari and Ronald Guiles, who were also indicted for the murder of Daniel Greene, testified for the prosecution. Both men served time together for crime committed in Ohio. Aratari for armed robbery and Guiles for first degree murder.

The evidence shows that Aratari first met Anthony Liberatore between April and June of 1977 (R. 2062-2063). Also, that he met and knew Lanci prior to August 15th

(R. 2102-2103), and Ciarcia shortly thereafter. Aratari also met Jack White and Calandra in the Murray Hill area.

On August 15, 1977, the Feast of the Assumption was being celebrated upon the "Hill". At the Roman Gardens, Aratari heard considerable conversation about the killing or attempted killing of Danny Greene. Lanci asked Aratari if he could do the job, and Aratari said sure.

Lanci said he would talk to his uncle, Anthony Liberatore, who was at that time the business manager for Local 860 in the Laborers Union, and a member of the Regional Sewer Board.

A couple of days later, Aratari was called at home and told by Lanci that Liberatore wanted to see him. The next morning Aratari went to Liberatore's office, Local 860, on East 40th Street in Cleveland, Ohio, and discussed the possibility of killing Danny Greene.

Aratari told Liberatore he could do the job. Liberatore stated that, "If you can make the hit on Greene, you don't have to worry about money no more".

Lanci and Liberatore told Aratari that Greene was a pretty powerful man in town, and if the Italians wanted to get anything back, particularly gambling, they had to kill Greene (R. 2322-2323).

Ferritto, during the summer of 1977, stayed at three motels: The Holiday Inn, Ramada Inn and Sheraton, all at I-271 and Euclid Avenue. He registered in these motels using his own name and credit card (R. 1333).

In the latter part of August or early September, Ferritto first learned that Liberatore had two men (Aratari and Guiles) working for him and that maybe they could be of some help on the Greene matter (R. 1355). He

met Aratari (R. 1359), and Guiles (R. 1361) at the Ramada where plans were further discussed to kill Danny Greene.

Ronald Guiles testified that he first met Lanci around September 19, 1977 at Lanci's office (R. 2967) and later at the Roman Gardens (R. 2971).

Aratari and Guiles both testified that they attended a wedding reception on September 24, 1977; that Lanci, Ciarcia and Liberatore were there (R. 2982); that they discussed fast cars, guns and had a general conversation about killing Greene (R. 2984). On the same night of the wedding, he and Aratari went to the Arthur Murray Dance Studio and obtained the 30.06 rifle, on arrangements made by Lanci.

Diane Knapik, an employee of the Arthur Murray Dance Studio, testified that she knew Lanci; that on a Saturday night in the Fall of 1977, Lanci *called* her on the phone (R. 4552) and made arrangements for Aratari and Guiles to pick up a package (rifle and ammunition) (R. 4244). She further testified that the two men came in, got the weapon and left. She later identified Aratari and Guiles, by photographs, as those two men.

Guiles and Aratari testified that Ciarcia furnished them with a former police car to be used for the "hit"; that Guiles used the name Carl Noble for temporary plates (R. 2994); that when they picked up the car shortly after the wedding, the power steering went bad and the car had to be towed back to the dealership from Aratari's home (R. 2996); that the car was repaired and picked up within a day (R. 3003), and used by them on the day of the killing. This is corroborated by the tow record and repair order taken from the records of Cross Roads Lincoln Mercury.

Guiles testified that he met Lanci and Liberatore at the Roman Gardens and on two separate occasions met Liberatore at a doughnut shop wherein the conversations all related to the killing of Danny Greene. He testified that Liberatore said, ". . . Mr. White (Licavoli) wants this done (the killing of Greene) right away" (R. 3016); that he met Ferritto and Carabbia at the Ramada Inn on two separate occasions (R. 3022, 3029).

As to the dates on which various meetings or events took place, Guiles stated, "One or two I know are correct, the others are—the dates may not be correct, but the incident is correct" (R. 3089).

Aratari would see Lanci everyday when he was available, if he wasn't on a trip to Florida or somewhere else. He also stated that Lanci played a lot of golf (R. 2454-2455, 2463). As to specific dates, Aratari said on cross-examination, ". . . I keep telling you I don't remember the dates".

Ferrito, Carabbia, Cisternino, Aratari and Guiles, during the summer and early fall of 1977, all tried to track down Greene. Aratari testified that he and Guiles were sent all over town looking for McTaggert, Ritson and then Greene (R. 2105).

Delsanter died on August 2, 1977. At his funeral in Warren, Ohio, and attending the funeral were Licavoli, Cisternino, Carabbia, Calandra, Ferritto and Fratianno. At that time, Ferritto first learned of attempts to tap the telephone of Greene; he also was told by Licavoli, Cisternino, Carabbia and Calandra that they had someone in the FBI who had furnished a list of informants; and that Greene was on that list (R. 1352-1353).

Geraldine Robinowitz, former file clerk for the FBI in Cleveland, Ohio, testified that upon the urging of Ciarcia

and in the Spring of 1977, she first took documents from the FBI (R. 3616); that Ciarcia first asked for information on himself, James Licavoli and Anthony Liberatore (R. 3620); that when she first gave secret information to Ciarcia, Lanci was present (R. 3629 & 3726); that in a list of FBI informants she delivered, Greene's name was on the list (R. 3637); that the list was given to Ciarcia at Cross Roads Lincoln Mercury and that Liberatore was present and gave her $1,000 at the time (R. 3638); that she delivered other documents and information to Ciarcia including reports on Licavoli and another list of informants including about 45-50 names.

In consideration for her efforts, Robinowitz was promised that a civil lawsuit she had pending would be pushed along. Also, she received an interest free cash loan in the amount of $15,000 from Liberatore to be used by her towards the purchase of a new home. At the time this was agreed to, Lanci and Ciarcia were present.

During the first week of October, Ferritto, Carabbia, Cisternino, Licavoli, Lonardo and Calandra met at Mosquito Lake. There Ferritto heard a tape recording of a female making a dental appointment for Danny Greene (R. 1384-1387) on October 6, 1977.

Cathy Grubbs, receptionist for Dr. Rossi, DDS, at Brainard Place, Lyndhurst, Ohio, confirmed the fact that Greene had an appointment on Thursday, October 6, at 2:00 p.m. and that the appointment was made on October 3rd (R. 1117). Denise Schmidt, girl friend of Greene, testified that she made the appointment (R. 1169).

In the morning of October 6, 1977, Ferritto, Carabbia and Cisternino all met at apartment 333, 27400 Chardon Road, Willoughby Hills, Ohio. There they assembled the bomb. Ferritto drove his 1973 Plymouth to Brainard Place,

followed by Carabbia, who drove a 1970 Chevrolet Nova bomb car, also registered to a fictitious person. There they met with Aratari and Guiles. The plan was to either shoot Greene with a scoped rifle or use the bomb package to kill if the opportunity presented itself.

When Greene's car arrived in the parking lot and Aratari and Guiles did not shoot him with the rifle because the Ferritto team could spot the bomb car. Ferritto backed the Nova car next to Greene's and a dynamite charge was placed in a metal container on the passenger side which was adjacent to the driver's side of Greene's car. When Greene left the doctor's office and approached his car, the bomb was remotely detonated by Carabbia and Greene was killed immediately. At the time, Ferritto and Carabbia were in the 1973 Plymouth and driving slowly toward the entrance ramp to I-271.

Lester Adelson, Deputy Coroner and Senior Pathologist, testified that Daniel Greene died as a result of multiple explosive injuries of his trunk and extremeties by bomb blast, with resultant immediate fatal injury (R. 1301).

Deborah L. Spoth testified that on October 6, 1977, she was driving her automobile near Brainard Place; that as she turned the corner to enter I-271, she heard an explosion and stopped her car. She observed a blue Plymouth across from her. She saw the driver, Ferritto, and a man in the back seat, Carabbia (R. 1937). As she proceeded onto the freeway, she again saw the same car. Her husband, who was a passenger, wrote down the Pennsylvania license plate number (R. 1941). She then related to her father, a Berea policeman, all that she witnessed. Within a few days, she identified a photo of Ferritto (R. 1945), and subsequently identified Carabbia (R. 1952).

Shortly after the Greene killing, Aratari received $5,000.00 from Lanci for his work (R. 2265). Aratari gave

$2,000.00 of this amount to Guiles. Aratari also received approximately $2,000.00 in clothes from Lanci who was a Vice-President at Diamond's Clothes (R. 2267, 2611). He also got a job through Liberatore and Lanci working for a union at $300.00 per week (R. 2269).

Henry Lum, owner of Cross Roads Lincoln Mercury, testified that in March of 1978, he found a Fruit Loops cereal box containing numerous FBI documents at his dealership where Ciarcia was a salesman. The contents and the box were turned over to the FBI and subsequently processed for fingerprints (R. 3818). The following latent fingerprints and palmprints were found on the various documents and papers: Lanci, 60 fingerprints and 3 palmprints; Ciarcia, 41 fingerprints and 5 palmprints; Calandra, 1 fingerprint; Liberatore, 1 fingerprint; Orlowe, girl friend of Ciarcia, 3 fingerprints; Geraldine Robinowitz, 1 palmprint; and Henry Lum, 3 fingerprints.

Dennis Sassano, of the Diamond Men's Store in Elyria, Ohio, testified that on October 7th, Lanci and a man named Tony, did come into his store and did remove certain merchandise (R. 4601-4602). Aratari testified that the clothing he received was in part payment for his participation in the Greene killing.

Aratari and a man named Percio, were arrested on February 28, 1978, after his automobile, stolen with stolen plates (R. 2937), was observed in the late evening hours in front of O'Donnell's Islander Bar. Recovered by the police at that time were a .357 Magnum pistol and a sawed-off shotgun Aratari said he received from Lanci for the Greene killing. Also, a shotgun Aratari testified that he received from Ciarcia was recovered. Donald Parker previously testified that he sold the .357 Magnum (State's Exhibit 88) to Lanci in 1974 or 1975. James Turner testified that he purchased the shotgun and left it at Ciarcia's girl friend's home in November, 1977.

## DEFENSE EVIDENCE

Defendants Lansi and Ciarcia both testified in their own behalf and offered evidence in support thereof. Both defendants denied involvement in the Greene killing. However, they did make significant admissions.

Lanci testified that he did meet Aratari through Del-Monte, Jr., and met Aratari at Liberatore's office where he claims to have sold the .357 Magnum to Aratari (R. 6520). He admits to being at the wedding where Aratari, Guiles and the Robinowitzes place him. He admits knowing Longaro, owner of the dance studio where Aratari and Guiles picked up the 30.06 rifle. He admitted being at the Flame Restaurant with Greene and Liberatore as previously testified to by Aratari and Peterson, Manager of the Flame (R. 6535). Also, he admitted going to the Diamond Men's Store in Elyria with Aratari on October 7th (R. 6540-6541); to being at Noreen Orlowe's home and to seeing the FBI documents which he claims were given to him when Ciarcia was going to have heart surgery in November or December, 1977 (R. 6547).

Ciarcia testified that he knew Liberatore since 1958. Also, that he knew Lanci and Geraldine and Jeff Robinowitz. He testified that he was present when Liberatore gave Geraldine Robinowitz $1,000.00 and she gave him a list of FBI informants (R. 6284). He admitted receiving various documents from Robinowitz (R. 6286) and also being present when the $15,000.00 was passed from Liberatore to Robinowitz (R. 6285-6286). Ciarcia admitted knowing Aratari and stated he sold the '74 used police car to Carl Noble (Aratari) rather than to have permitted him to use it for the Greene killing (R. 6302).

## REASONS FOR DENYING THE WRIT

**1. The trial court's dismissal of one count of a multiple count indictment inures to a petitioner's benefit. Where the Court instructs a jury not to consider such a dismissed count, the petitioner is not prejudiced by his failure to request specific instructions in relation thereto.**

See, *State v. Rogers,* 64 Ohio App. 39; *State v. Carver,* 30 Ohio App. 2d 115; *U. S. v. Smith,* 343 F.2d 847; *U. S. v. Santos,* 385 F.2d 43; *State v. Lane* (1976), 49 Ohio St. 2d 77; 10 O. JUR. 2d, *Constitutional Law,* Sec. 158.

Some of the evidence offered as to the count charging organized crime was offered primarily to prove the existence of a conspiracy to kill Danny Greene as it related to the other counts of the indictment. Raymond Ferritto testified that in a conversation with Tony Delsanter, ". . . he asked me if Jimmy Fratianno talked to me . . . about problems in Cleveland . . . with Nardi and Greene . . . that they were trying to muscle in on some of the gambling activities and they wanted . . . them killed" (R. 1314); in conversations with Jack White (Licavoli), ". . . he told me . . . he was going to give me 25 per cent of all the gambling and things that were going on in Warren - Youngstown area . . ." for killing Greene. As to the documents taken from the FBI files, Ferritto testified that he was told by Jack White, Cisternino and Calandra ". . . that they were going to receive some information directly from the FBI office by someone who was working there and . . . this information would pertain to informants". He also testified that they received the list and Greene's name was on it (R. 1351-1352). Sixty of Lanci's fingerprints were on those stolen documents, and three of Lanci's palmprints.

It is obvious that the conversation as testified to by Ferritto were admissible against the co-conspirators on the murder count and also the count charging organized crime. In conspiracy trials, each party to a conspiracy is criminally responsible for all acts done in furtherance of the conspirational design and they become ad hoc agents for one another, and what one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all. *State v. Rogers,* 64 Ohio App. 39; *State v. Carver,* 30 Ohio App. 2d 115; *U. S. v. Smith,* 343 F.2d 847; and *U. S. v. Santos,* 385 F.2d 43.

The crime as outlined in Ohio Revised Code, Section 2923.04, *Engaging in Organized Crime,* a substantive conspiracy crime, was adopted by the Ohio Legislature and made effective January 1, 1974. The legislature enacted this section based largely on the same crime as found in the Proposed Federal Criminal Code. No prior law existed in this State governing these matters. Appellant alleges that the engaging in organized crime statute is unconstitutional. However, for trial purposes, the presumption of constitutionality should exist.

In 10 O. JUR. 2d, *Constitutional Law,* Section 158, it is held:

> "It is firmly established that the courts must always indulge a strong presumption in favor of the constitutionality of legislation. This principle has been variously expressed, and is closely connected with the rule that the courts will construe legislation so as to uphold its constitutionality if possible, and will resolve all doubts in favor of constitutionality."

At Section 162 it is held:

> ". . . It is the duty of the court where constitutional questions are raised to liberally construe a statute . . . to save it from constitutional infirmities. . ."

That the Court entered judgment for defendants on the organized crime statute, at the conclusion of all of the evidence, inures to the benefit of them. There has been no showing of an inadmissible spill-over effect that would be prejudicial to appellants. It is interesting to note, that the Court conceded there was sufficient evidence of the crime, but just an insufficient number of chargeable people to satisfy the statute.

The petitioner's suggestion that his request to limit the scope of the prosecution's final argument is akin to a request for instruction is, of course, unwarranted. A petitioner may not assign as error his failure to request specific instructions. *State v. Lane* (1976), 49 Ohio St. 2d 77. It must be noted, in the case before us, that the Court did instruct the jury not to consider the dismissed organized crime count (R. 7224).

**2. Consistency between the verdicts on the separate counts of an indictment is unnecessary where petitioner is convicted of one count, but acquitted on others.**

See, *State v. Adams* (1978), 53 Ohio St. 2d 223; *State v. McNicol* (1944), 143 Ohio St. 39; *Browning v. State* (1929), 120 Ohio St. 62; *Griffin v. State* (1868), 18 Ohio St. 438; *State v. Perryman* (1976), 49 Ohio St. 2d 14; *Ledbetter v. State* (1961), 224 Md. 271, 167 A.2d 596; *People v. Steinbridge* (1950), 99 Cal. App. 2d 15, 221 P.2d 212; and Ohio Revised Code, Section 2929.03(A).

As stated by the Court of Appeals in this case, "It has long been the law within this State that there need not be consistency between verdicts on separate counts of a criminal indictment . . . *State v. Adams* (1978), 53 Ohio St. 2d 223; *State v. McNicol* (1944) 143 Ohio St. 39; *Browning v. State* (1929), 120 Ohio St. 62; and *Griffin v. State* (1868), 18 Ohio St. 438. . ."

In *State v. Perryman* (1976), 49 Ohio St. 2d 14, the Court held:

> "3. Where a jury convicts a defendant of an aggravated murder committed in the course of an aggravated robbery, and where that defendant is concurrently acquitted of a specification indicting him for identical behavior, the general verdict is not invalid."

The Court at page 26 said, ". . . Furthermore, as indicated in R.C. 2929.03(A), one may be convicted of aggravated murder, the principal charge, without a specification. Thus, the conviction of aggravated murder is not dependent for the finding of the specifications thereto. . ."

In the case of *Ledbetter v. State, supra,* a verdict of guilty of murder was held not inconsistent with an acquittal of robbery during which the murder was alleged to have been committed. The Court pointed out that the jury could have concluded without being completely illogical that defendant had attempted to rob the victim, but had not personally succeeded, and thus acquitted him of robbery while finding him guilty of murder because he was acting in a common design with his three companions who had robbed and murdered the victim. The Court further cited authority that a conviction on one count may stand even in the face of an inconsistent acquittal on another count.

It was held in *People v. Steinbridge, supra,* that burglary and murder are two separate and distinct offenses and it is not a reversible inconsistency that the jury acquits on a count charging burglary but convicts on another count charging murder.

The jury finding of guilty of aggravated murder against petitioner, and not guilty of the specification and not guilty

of aggravated arson, does not call for reversal because of inconsistency.

**3. The petitioner's failure to request limiting instructions to the introduction of certain evidence constitutes a waiver of any error in the Court's omission to so instruct.**

See, *State v. Lane* (1976), 49 Ohio St. 2d 77; *State v. Tudor,* 154 Ohio St. 249; *State v. Scott,* 107 Ohio St. 475; and *Knotts v. Valocchi,* 2 Ohio App. 2d 188.

The Court allowed into evidence acts relevant to show the conspiracy to kill not only Danny Greene, but also his associates. Particularly and as it relates to Lanci and Ciarcia, their participation in the entire conspiracy, reveals why Greene was killed.

In relation to the theft of government documents, the evidence reveals that an informer's list was obtained from the FBI files, and was in the hands of the conspirators, more than a month prior to the killing of Danny Greene. Danny Greene's name was on that list (R. 1352). That in fact Greene was an informer was later verified by Ferritto as he listened to tapes, taken from the Greene telephone tap, as he overheard Greene talk to members of the FBI (R. 1348).

Aratari testified particularly to the continuing involvement in the conspiracy by Lanci, Ciarcia and Liberatore. He stated that at first he was put on Kevin (McTaggert) and Keith (Ritson) and then on Greene (R. 2105). He further testified that Lanci told him, "My uncle (Liberatore) and I have decided that we got to pull you off Keith and Kevin, because Ray Ferritto and Ron Carabbia cannot handle Danny Greene alone" (R. 2136).

After Greene was killed, Aratari testified that he kept in close contact with Lanci, Ciarcia and Liberatore. "My work was not finished . . . I had to work on about four other contracts. . . The main concern was the Irish crew . . . They told me to get the Irish kids out of the way" (R. 2262).

It is interesting to note that appellant complains bitterly about the Court's failure to charge the jury on the limited use of such testimony.

The Court and all counsel, including the very able, experienced and competent trial attorneys for appellant, discussed the Court charge on many occasions during the trial. The Court specifically requested of counsel to furnish suggested charges and to assist in the preparation of the charge (R. 3801, 6256, 6266, 7044, 7119, 7250).

Counsel for Lanci and Ciarcia, rather than to request a charge on other act testimony, specifically requested of the Court not to charge the jury on aiding, abetting and conspiracy (R. 7209, 7363). When the charge was read to the jury, again, counsel were given the opportunity to discuss omissions additions to the charge, etc. They made no request for the limiting instructions of which they now complain (R. 7666-7676).

In *State v. Lane* (1976), 49 Ohio St. 2d 77, the Court held:

> "A party may not assign as error the trial court's giving or failure to give any instructions unless that party objects thereto, before the jury retires to consider its verdict, and states specifically the matter to which he objects and the grounds for his objection (Crim. Rule 30). The Court at Page 84 further stated that by his failure to comply with the directives of Crim. Rule 30, the appellant has waived any possible error."

In *State v. Tudor,* 154 Ohio St. 249, that Court held:

> "1. Where a trial court gives an instruction in answer to an inquiry of the jury which instruction is incomplete but correct as far as it goes, counsel has the duty to request the trial court to charge further so as to eliminate any possible confusion of the jury which may result from the incompleteness of such instruction. Any failure to charge further, if it is error, is an error of omission and not of commission. Unless counsel has requested the court to supply the omission, such error will not ordinarily justify reversal even in a criminal case."

The Court in *State v. Scott, supra;* and *Knotts v. Valocchi, supra* held as in *State v. Tudor, supra.*

**4. The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and that was not considered or decided by that Court.**

The petitioner did not raise the issue of ineffective assistance of counsel in the Court of Appeals. As stated by the Supreme Court of Ohio in *Toledo v. Reasonover* (1965), 5 Ohio St. 2d 22, the ". . . Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that Court. . ." To do so, ". . . we would be permitting the defendant to bypass the Court of Appeals." *State v. Jones* (1965), 5 Ohio St. 2d 13.

In any event, counsel at the trial level were very experienced and able trial counsel. They were counsel of petitioner's choice. The record reflects, because of the nature and extent of the defense presented, the attorneys

had more than adequate time for trial preparation. Petitioner should not now be heard to complain that because of trial tactics, prior design, ploy, strategy or purpose, his defense did not materialize as intended.

## CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 80-1768

# In the Supreme Court of the United States

**October Term, 1980**

THOMAS LANCI,
*Petitioner,*

vs.

THE STATE OF OHIO,
*Respondent*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

## PETITIONER'S REPLY

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No. 80-1768

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS LANCI,
*Petitioner,*

vs.

THE STATE OF OHIO,
*Respondent.*

## PETITIONER'S REPLY

The State's counter-statement of the facts in this particular cause contains more than the usual number of misstatements one routinely finds in Briefs filed by this prosecutor's office. While these gross distortions, in most instances, bear on critical factual issues in the case, even if the State's assertions as to what the *evidence* was are fully credited, our arguments would in no way be diluted or rendered any less persuasive. Indeed, the real reason the State's Brief is so over-loaded with purported "facts" emphasizes the almost total lack of depth in their arguments.

### I

Under its first *Reason for Denying The Writ*, the State argues that "some" of the evidence admitted *substantively* against this petitioner was based solely on the Organized Crime charge. This charge had been predicated on an unconstitutional statute. In any event, the trial court entered a judgment of acquittal *after* having required petitioner to present evidence against that charge as well. Yet, despite this critical concession, the State still makes the absolutely ridiculous argument that the jury's consideration of this evidence as substantive proof "inured" to Lanci's benefit. At least this much is certain, the State's argument is ridiculous *unless* the State is arguing (and such is possible given their reference to the trial judge's obligation to construe a statute to save it from con-

stitutional infirmities where possible, *[Brief of Respondent,* p. 13]), that no prejudice is ever possible from this pattern of events. Logic, on the other hand, supports *only* the conclusion that prejudice occurred here *and* this petitioner was victimized thereby.

## II

The State's consistency argument truly deserves to be labelled sophomoric. For rather than come to grips with the salient issues as postured by our contentions, we are told how long it has been the law in Ohio that there " 'need not be consistency between verdicts on separate counts of a criminal indictment' " *(id.,* at 14). For our part, the apt questions that emerge here, of course, simply cannot be resolved on such a simplistic analysis as offered by the State. Rather, what was, and is, required is an analysis that effectively deals with the idea that this jury found *Thomas Lanci not quilty of participating in the arson* that caused the death of Danny Greene that had indisputably been caused by the *very arson* Thomas Lanci was acquitted on.

## III

What the State seems to be arguing, as their *Third Reason,* is that when it offers as *substantive proof* certain evidence, valid defense objections to such evidence simply do not reach *any,* and certainly not *all,* possible collateral purposes for which such evidence might have been admissible. Thus, it is reasoned that (regardless of how sophisticated) where the appellate court can divine any such purpose, not only can it be imputed to the trial judge as to his reasons for admitting such evidence, but the defendant can be penalized for the lack of instructions limiting the evidence to such purposes by attributing the resulting flaw in his conviction to his defense counsel.

What counsel obviously overlooks is that it is simply "unfair for a reviewing court to consider evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at trial," *United States v. Check,* 582 F.2d 668, 683 (2d Cir. 1978). Or, to state it another way, that a

"trial becomes unfair if testimony thus accepted *[e.g.* as substantive proof] may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." *Shepard v. United States,* 290 U.S. 96, 102-103 (1933).

## IV

As to the State's argument that our ineffective assistance of counsel claims *were not* addressed to the Ohio Court of Appeals, only a brief reference need be made to our Application for Rehearing filed with the appellate court. (See Appendix to this Reply.) Here, it was argued that the court's rather determined and arbitrary decision to salvage this conviction by imputing the cause for very serious flaws in this conviction to counsel for the petitioner created a substantial basis for the claim of ineffective assistance.

Since there is no chance this Court will *ignore* the fact that the incompetency of counsel issue here under consideration was *specifically* raised and *specifically* rejected by the Court of Appeals, the fact that the State would even try to finesse this Court into believing the issue was not raised in the appellate court (as was done at pp. 18 and 19 of the *Brief in Opposition)* is eloquent verification as to the quality of the various arguments made throughout the State's brief.

In any event, in our petition it was correctly represented that the argument was specifically addressed to the appellate court that certain of their findings, if valid, made it clear Thomas Lanci suffered from the lack of ineffective assistance of counsel (see *Petition,* p. 3). So postured, the assertion that the incompetency of counsel issue was not raised in the Court of Appeals is only valid if arguments made to an appellate court before their released opinion becomes final are meaningless at best.

## CONCLUSION

This cause is easily regarded as one containing serious and substantial constitutional issues. Unavoidably, the issue here involving the ineffective assistance of counsel, especially when

coupled with the State Court's efforts to blame petitioner's trial counsel for the presence of numerous faults in this trial, is an issue that must eventually be resolved. The presence of this issue speaks most eloquently to the point that it should be resolved now and in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Reply was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this day of June, 1981.

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# APPENDIX

**IN THE COURT OF APPEALS**
**EIGHTH JUDICIAL DISTRICT OF OHIO**
**CUYAHOGA COUNTY**

CASE NOS. 39906 and 39907

(Filed October 6, 1980)

STATE OF OHIO, )
)
Plaintiff-Appellee, )
)
)
vs. )
)
)
THOMAS LANCI, )
)
and, )
)
KENNETH CIARCIA, )

Defendant-Appellants )

**MOTION FOR RECONSIDERATION**

In all deference to the Court, the decision announced herein should be Reconsidered for the various reasons argued below. Since some of our positions can possibly be viewed as an aggressive criticism of the Court's announced reasoning, it is hoped the Court will understand we have been guided by the perogative of counsel to vigorously assert with candor, however blunt, what we believe to be valid criticisms of judicial action with reference to our clients' liberty.

Here we begin with the observation that, in our judgment at least, this Court's unambiguous recognition that certain flaws occurred in the trial leading to these convictions. Given these correct determinations, it is most difficult to understand how the Court could still say, with any sense of conclusiveness of law or fact, that an affirmance here was nonetheless proper.

Our view, which clashes mightily with the Court's, is that once meaningful errors of the type we have here were credited with being present, there is absolutely no way (from the fastness of an appellate court) the pulsebeat of the courtroom can be perceived with sufficient reliability to enable this Court (or any court) to correctly determine that even had such errors *not* occurred, the jury's verdict would have nonetheless been the same.

In our view, this Court has simply closed its eyes to the probabilities of courtroom dynamics. For, once the trial court granted the Motion for Judgement of Acquittal on the Organized Crime count, as it should have been based on the flagrant lack of evidentiary support (*Jackson v. Virginia*, 443 U.S. 307 [1979]), the critical issues that emerged could not turn on whether it was the defense's responsibility to request that the trial judge take the appropriate action (with reference to the evidence admitted solely on the basis of the Organized Crime charge). Yet, this Court has satisfied itself that the responsibility for corrective action being taken rested with the defendants themselves to make a request. A further upshot of the Court's view is that Lanci and Ciarcia must personally bear the brunt of counsels' failure to request the action needed to dull the impact of the evidence the jury had no right to consider, since they were the ones vicitimized.

The fact that *no action* was taken by the trial court, who was responsible for much of this evidence even being admitted in the first place (since he failed to heed numerous objections and Motions and failed to grant the Motion for Acquittal at the close of the State's case - as he should have), in our judgment, is most critical. This is so because there is really no realistic way it can be said that these men were not prejudiced by the jury's consideration of this evidence *as substantive proof* of their guilt. Indeed, our ultimate position here is, once the trial court became convinced the Organized Crime charge had not been made, there was a manifest necessity for the granting of a mistrial and that counsel's failure to request such can be regarded as an instance of *ineffective assistance of counsel.*

Next, it was under segment VI of the Opinion that the Court's reasoning reaches its zenith. Here again, the Court imputes the blame for the lack of needed instructions on the appellants. In convincing itself this was the appropriate conclusion, the Court seemingly started its critical syllogism with what we regard to be a flagrant false premise. For the Record simply *does not* support the conclusion that "evidence of the other crimes, committed by the various principals involved by the evidence therein, was admissible against these appellants *under R.C. of Ohio*, §2945.59" *(Opinion*, p. 15).

Chief among the problems with the Court's ratiocinations are certain irrepressible considerations: (1) *most* of the evidence was not offered by the State on the basis of §2945.59 (see, *e.g.*, R 2199-2199/K); and (2) limiting instructions were specifically requested (R 3533) as were objections and motions to strike (R 3800-3801) made with reference to this testimony. In addition, the Record also fails to show that the bulk of this evidence was admitted for *any* of the collateral purposes indicated in the statute.

But, even this is not all. To simply conclude the evidence was admissible for a limited purpose and was only considered as substantive proof because counsel did not request the appropriate limiting instruction, only begs the question. That question, simply put, is: Did the jury's consideration of this evidence as substantive proof deprive these appellants of a fair trial? If the answer to that question turns (as this Court says it does), on the fact that defense counsel did not sufficiently object, then the conclusion is inescapable –these *appellants were denied the effective assistance of counsel.* This, in turn, is a consideration that must be deemed to have been rejected by this Court in the overall conclusion that no plain errors under Rule 52 are present anywhere in this case. As we see it, however, the position taken by the Court in this instance really punishing these appellants because their counsel did not do a vain act.

Then, under Section VIII, this Court (in a fashion somewhat comparable to elusive arguments made by the State to the trial court and to this Court) tells us that appellants were not tried for "the offense of conspiracy to murder Danny Greene" (*Opinion*, p. 17). This is certainly true, or should have been, since a count making that precise charge was dismissed before trial. And, we agree that under §2923.03 (A) (3) one can be found guilty of a substantive offense if it is shown he was a conspirator with reference to such offense *and* the offense was, in fact, committed in furtherance thereof during the period of his membership. *Pinkerton v. United States*, 328 U.S. 640, 645 (1946). But, see *United States v. Bertolotti*, 529 F. 2d 149 (2d Cir. 1975), and *United States v. Sperling*, 506 F. 2d 1323 (2d Cir. 1974).

It also is true that the State is entitled, in some cases, to any evidentiary advantages that could be developed under conspiracy concepts. However, more than a *prima facie* showing of a conspiracy need be shown as a condition precedent. To be sure, this *prima facie* notion conflicts with the best reasoned opinions in this area. See *United States v. Nixon*, 418 U.S., at 710, fn. 14, cited in *Appellants' Brief*, at p. 35 and *Ohio Rules of Criminal Evidence*, Rules 104 and 801 (D) (2) (E). In any event, the admissibility of evidence as being in furtherance of a conspiracy is a most complicated concept even for courts that have dealt with its ramifications for years. *United States v. Valencia*, 609 F. 2d 603 (2d Cir. 1979), and *United States v. Jackson*, 588 F. 2d 1046 (5th Cir. 1979).

This Court has totally disregarded the fact that the trial court did not make any preliminary determination that a conspiracy existed, nor did the trial court enumerate its members and its duration (which seemingly would have terminated with the death of Greene). So postured, it's simply blinking at reality to say the mere reference to conspiracy principles means those concepts were both understood and correctly applied.

At least this much is certain – nothing has been said by the prosecutor, or the trial court, to date to suggest they understood the relevant principles. So, for this Court to say they were correctly applied hardly makes sense.

Finally, in dealing with our sufficiency arguments (in segment X of the Opinion), the Court cornerstones its reasoning patterns by an almost ferverent reliance on evidence attributed to Ferritto, Aratari and Guiles (*id.*, at 21). Since it is true that the Court should view even this evidence in favor of the verdict where it is reasonable to do so, it hardly makes sense for us to tell the Court that the testimony of Aratari was impeached almost to the hilt by facts showing extreme motives, financial rewards, perjury and gross internal and external conflicts when compared with other *facts* and witnesses. The same is true of Ferritto and Guiles.

However, when concern is not merely the sufficiency of the evidence to withstand the test required by *Jackson v. Virginia*, 443 U.S. 634 (1979), and *Speigner v. Jago*, 603 F. 2d 1208 (6th Cir. 1979), very serious questions surface. Here we refer to the Court's views that various errors were harmless and did not deprive these appellants of a fair trial. Since the validity of any harmless error conclusion must be measured by the strength of the proof tending to show guilt, a sophisticated issue arises, one that must be viewed as relevant for this Court, since the claim is now being made that the appellant Lanci *did not have the effective assistance of counsel.* Proof positive this is so is submitted as being this Court's conclusion that certain errors occurred here because of the failures of his counsel.

## CONCLUSION

The credibility of Aratari, Ferritto and Guiles was vital to the State's case. To the extent their credibility was bolstered or corroborated by inadmissible evidence, or evidence admitted for limited purposes unrelated to their credibility, or by the believability of their testimony with reference to facts and events that properly should have played no part in the trial itself, the errors involved could not possibly be harmless beyond a reasonable doubt.

Since it is not the perogative of Courts to usurpt the function of the jury and speculate whether, without the evidence wrongly admitted as substantive proof *and* even had trial counsel been effective, the verdict would have been the same; where, as here, prejudicial (or potentially prejudicial) evidence was improperly admitted and was augmented by the occurrence of other flaws, its harmful character cannot be determined by appellate court judges. Certainly, this must be so unless they resolve themselves into a jury and ignore the findings based on incompetent evidence and significant flaws.

For our part, the fact that considerable evidence was offered and admitted as substantive proof, and was so considered by the jury, really makes our point. Simply put, this Court *now* says "most" of this assailed evidence was admissible

for certain limited purposes, or would have been excluded if defense counsel had asked. Assuming this to be so, to penalize these appellants personally because their attorneys did not convince the trial court (despite counsels' correct objections to the evidence as offered), *to admit* some of this evidence as proof against their clients for such limited purposes really asks too much. *Cf., State v. Smith*,[1] 59 Ohio App. 194 (1977). The bottom line thus appearing is that this Court seems to be quite willing to offend the principle that appellate courts should not "consider evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at the trial." *United States v. Check*, 582 F. 2d 668, 683 (2d Cir. 1978). Also see *United States v. Brown*, 490 F. 2d 758, 763 (D.C. Cir. 1973), and *United States v. McClain*, 400 F. 2d 241 (D.C. Cir. 1971). The appropriateness of this idea here can only be augmented by references the *Check* decision makes to the rather sagacious remarks of Justice Cardozo in *Shepard v. United States*, 290 U.S. 96, 102-103 (1933). Here it was said, for a unanimous court (in a case that really focuses on an aspect of the evidence spectrum involved in this case) that where testimony was admitted for one purpose, the "trial becomes unfair if [such] testimony thus accepted may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." *Id.*, at 102-103.

Our position here can be analogized to that very recently expressed in *United States v. Cain*, 587 F. 2d 678 (5th Cir. 1979). In that case, the court concluded that where cogent evidence (if admissible at all) is admissible for a very limited purpose, the danger of the jury misusing such evidence is simply too great to leave the accused unprotected by a sufficient instruction. Also *see, United States v. McClain*, 440 F. 2d 241, at 246 (D.C. Cir. 1971).

[1] In *Smith*, contrary to the position taken by this Court, it was concluded:

> "Where the state presents testimony, without limitation, against an accused pertaining to his commission of other crimes, for which he has not been indicted, and the crimes bear no relevance to an element of the offense with which he is charged, the court's admission of such evidence is prejudicial error."

Hopefully, this Court has not allowed its, and the public's, natural antipathy toward "organized crime" to cloud its perception of due process in the notorious "Danny Greene Murder" trials. Hopefully too, this Court will not succumb to the notion that "ornithological specimens of identical plummage congregate," and for that reason rationalize that these appellants received the justice they deserved. For our part, we shall continue to subscribe to the principle that the rights of the very best among us are only as secure as those of the worse are protected.

What is required here is a Reconsideration of this cause, during the course of which the Court will also gauge the impact of our further contention that to the extent these appellants were prejudiced as a consequence of their trial counsel's failure to protect them in the instances noted by the Court, they were denied *the effective assistance of counsel.*

For all of these reasons, this Motion for Reconsideration should be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion for Reconsideration was mailed to the offices of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this day of October, 1980.

/s/ JAMES R. WILLIS, ESQ.
Attorney for Appellants